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THE NEW PUBLIC CORPORATIONS AND THE LAW

1. BACKGROUND AND GENERAL CHARACTERISTICS OF THE PUBLIC CORPORATIONS

THE Public Corporation is emerging as the chosen legal instrument of the Labour Government for the public control of basic industries in an economy still based on private enterprise.

The public corporation is not a novelty either here or abroad. In this country various institutions which might, with greater or lesser justification, be described as public corporations have developed since before the first world war [1] and especially between the two wars.[2] Some of these are now being replaced by public corporations of the new pattern.

Abroad, the public corporation has appeared in different countries and forms. Both its value and its elasticity can be gauged from the fact that it has been adopted in the Socialist and entirely State-controlled economic system of Soviet Russia as well as in the capitalist system of the United States.

The Soviet Union proceeded, only a few years after the Revolution, to develop the institution of the State Trusts [3] for the running of major industrial State enterprises. These trusts are constituted as autonomous legal units; they received their charter from the Supreme Council of National Economy, which also appoints the members of the board; they have two types of capital assets which roughly correspond to the distinction between fixed and floating assets of British company law. The fixed assets belong to the State, the floating assets belong to the trusts. That is to say, they are State property at one remove and can be freely disposed of. The

[1] Such as the Port of London Authority, 1908 (P.L.A.).
[2] A description and critical analysis of the then existing Public Corporations will be found in Lincoln Gordon's *Public Corporations*, 1937, and in *Public Enterprise* (ed. Robson), 1937.
[3] The first decree was of April 10, 1923.

trusts enter into contractual and other legal transactions, and legal disputes between them are settled by State arbitration which appears to have developed principles of mixed contract and administrative law.[4]

In Germany the public corporation appears in two forms. One, which cannot be described as a genuine type of public corporation, is the undertaking organised in the form of a joint stock company and governed by company law, with the State or other public authorities holding a controlling or substantial interest as shareholder.[5] A more genuine form of public corporation was devised when the Dawes Plan constituted the German State railways as an independent commercial company, under a control board with allied participation, charged with reparation obligations and separated from the State budget.

By far the most highly developed and instructive type of public corporation for the British lawyer is the Tennessee Valley Authority (T.V.A.), one of the greatest triumphs of the public corporation as an institution of public control in a non-Socialist economy. It will frequently be referred to for comparison.

Finally, the international public corporation is the obvious legal form for the functional international institutions constituted by a number of different Governments. Thus, both UNRRA and the International Monetary Fund are constituted as international public corporations.[6]

General Characteristics of Public Corporations

While the idea of an autonomous corporation person responsible not to private shareholders but to public authority has thus commended itself to the most diverse legal and social systems, the structure and characteristics of the public corporation are inevitably determined by the difference in the legal, and constitutional systems in which they are established. The objective is given in President Roosevelt's classic summary (in his message to Congress in 1933 recommending the formation of the T.V.A.): 'Clothed with the power of Governments but possessed of the flexibility and initiative of

[4] Cf. Schlesinger, *Soviet Legal Theory*, pp. 137–139, 247.

[5] This is known as 'Mixed Public Enterprise' (Gemischt-Wirtschaftliche Unternehmung).

[6] Cf. Friedmann, 'The International Public Corporations', in 6 Mod.L.Rev., p. 185 *et seq.*, and *World Unity Booklets No.* 2 (Michael Joseph, 1946).

a private enterprise'; but there are vast differences between the Soviet State Trust which is under the all-pervading economic and political control of the Soviet Government, in a completely socialised system, the T.V.A., whose responsibility towards Congress and President respectively reflects the American system of division of powers, and the British public corporation which, after some experimenting, now reflects the British system of indirect responsibility to Parliament, through the Government.

The public corporation has been adopted in eight major new Acts. In some of them it is the centre piece, in others an auxiliary organ of administration.[7] This means not only a vast quantitative increase, but a decisive advance on the previous experimental use of the public corporation. Firstly there emerges from these new Acts a definite constitutional and legal pattern which replaces the rather haphazard and casuistic form of the previous public corporations. Secondly, the public corporation now enters the field of economic, industrial and social life in a major way. An important sector of national economic and legal relations will henceforth be determined either by relations between the different public corporations, between public corporations and other public authorities, or between public corporations and private enterprise. The multitude of new economic and social legal problems which emerge from this will only gradually become apparent.

While a few of the former specialised public corporations survive, such as the B.B.C., the majority will be merged in the new corporations. The general characteristics of the new public corporation, as an instrument of planning in the mixed economy of Britain, may briefly be described as follows:—

(i) The public corporation has no shares and no shareholders, either private or public. Its shareholder, in a symbolic sense, is the nation represented through Government and Parliament.

(ii) The responsibility of the public corporation is to the

[7] 1. The National Coal Board under the Coal Industry Nationalisation Act, 1946.
2. The Development Corporations under the New Towns Act, 1946.
3. The Airways Corporations under the Civil Aviation Act, 1946.
4. The Regional Hospital Boards under the National Health Service Act, 1946.
5. The British Transport Commission under the Transport Bill.
6. The British Electricity Authority and the Area Boards under the Electricity Bill.
7. The Agricultural Land Commission under the Agriculture Bill.
8. The Central Land Board under the Town and Country Planning Bill.

Government, represented by the competent Minister, and through the Minister to Parliament.

(iii) The administration of the public corporation is entirely in the hands of a board which is appointed by the competent Minister, sometimes after and mostly without consultation with any special group or industry but invariably not on a basis of representation of specific interests.[8]

(iv) The capital of the public corporation is provided, in the case of public corporations administering nationalised industries, through assets taken over from private ownership and capitalised through the issue of interest-bearing stock.

Such stock is either Government stock or, in most cases, stock issued by the public corporation with a Treasury guarantee. The financial assets of public corporations which have not acquired the assets of formerly private industries (such as the Airways Corporation) consist of stock with a Treasury guarantee supplemented by the power of the Minister to give certain Exchequer grants during the formative period. The industrial public corporations have furthermore the power to borrow money, with the consent of their supervising Minister and the Treasury, within limits fixed by the Acts.

(v) The public corporation has the legal status of a corporate body with independent legal personality.

(vi) All public corporations have some form of commercial accounting and auditing which is subject to some form of public control. But the type of accounting and public control varies according to the type of public corporation.

(vii) All public corporations have a dual nature; they are instruments of national policy but they are autonomous units, with legal independence and certain aspects of commercial undertakings. The degree of independence varies, however, according to the type and purpose of the public corporation.

Two Types of Public Corporation

The public corporation as it now emerges in this country is not confined to the conduct of industrial or commercial enterprises. It is essential, both for general and for legal

[8] The Board of the P.L.A. consists of representatives of the directly interested industries. The Board of the L.P.T.B. is appointed by trustees. While the former method can be justified for the particular case of a port authority, the latter method has been criticised by both Gordon and Robson as removing the board from proper public control. This method of 'appointing trustees' has now been definitely abandoned.

purposes, to distinguish between the two types of public corporation. There is, firstly, the industrial or commercial public corporation proper. It is represented so far by the National Coal Board, the Electricity Authority (and the Area Boards), the Transport Commission and the Airways Corporations. These public corporations are designed to run an industry or public utility according to economic and commercial principles but in the public interest. There is, secondly, the social service corporation; it is designed to carry out a particular social service on behalf of the Government. This type of public corporation is represented by the New Towns Development Corporations, the Regional Hospital Boards, the Central Land Board and the Agricultural Land Commission. But there are variations within this type. Some show closer affinity to the commercial type than others.

As will be seen from the subsequent analysis, the two types of public corporation differ greatly in regard to ministerial control, finance and probably also judicial supervision. The commercial corporation is essentially independent in its conduct of business and subject only to remote ministerial control. The social service corporation is generally under closer ministerial direction than the commercial corporation. The finances of the latter do not fall under ministerial budgets and are not a charge on the vote. The former are financed as part of a departmental budget and therefore subject to closer public auditing control. The social service corporation is, in a far more direct sense, a prolonged arm of the Executive. This may be of importance for the limits of judicial ultra vires control.

2. ORGANISATION AND CONSTITUTION

Appointment of Board

In all cases the boards are appointed by the competent Minister, who is not tied by any consideration of representative interests in his choice. Appointments have in fact been made throughout on an independent, non-party and non-political basis, though the different members naturally represent various walks of life and experience.[9]

[9] In the National Coal Board, for example, the various members have been chosen with regard to their technical knowledge of the Coal Industry, administrative experience, Trade Union and Labour Management experience, etc.

The relevant clause in the Coal Industry Nationalisation Act is typical: 'The Board shall consist of a chairman and eight other members. The chairman and other members of the board shall be appointed by the Minister of Fuel and Power . . . from amongst persons appearing to him to be qualified as having had experience of, and having shown capacity in, industrial, commercial or financial matters, applied science, administration, or the organisation of workers'.[1]

While in some cases the qualifications of the persons whom the Minister should appoint are specified, he is left complete discretion in others. Some Acts specify groups or authorities which the Minister has to consult before appointment.[2]

The Minister is usually given power to make regulations with respect to the tenure of office of the board. A standard practice is undoubtedly developing in this field.[3] Neither the members of the board nor the staff of the public corporation are civil servants. The appointment is for a definite term and upon conditions as determined by the Minister with the approval of the Treasury. Members of the boards may resign or be dismissed by the Minister, in cases specified in the regulations. Apart from membership of Parliament, which is incompatible, the main grounds upon which the Minister may 'declare the office to be vacant' (in other words dismissal) are the members' engagement in any trade or business including a directorship of a company, or a position as officer or servant in an organisation of workpeople. But there is also a general power of dismissal in the case of continued neglect of duty (such as absence from meetings of the board for more than six months consecutively and unfitness to continue in office or incapability of performing the duties). In all these respects the discretion lies with the Minister, who is given power to approve exceptions, for example in regard to membership of a company or of a workmen's organisation. It is to be hoped that he will not normally approve exceptions. A necessary and wholesome provision in the regulations is the obligation laid upon every member of the board to disclose to the Minister full particulars of any interest held either

[1] Section 2. Similar clauses are found in: Civil Aviation Act, s. 1; New Towns Act, s. 2; National Health Service Act, Sched. III; Electricity Bill, s. 3; Transport Bill, s. 1; Town and Country Planning Bill, s. 2; Agriculture Bill, s. 65.

[2] *E.g.*, the University Medical Professional Organisation and Local Health Authorities which are to be consulted in the appointment of members to the Regional Hospital Boards. Cf. Third Schedule to National Health Service Act.

[3] Cf., for example, S.R. & O., 1946, No. 1094, regulating appointments to the National Coal Board, in pursuance of s. 2, Coal Industry Nationalisation Act.

directly or indirectly in any business similar to that carried on by the board. This includes interests in board contracts and membership of any firm interested in such contracts. It has been customary to provide for "staggered" appointments so that terms of office of the different members of the board shall not expire simultaneously, to the detriment of the continuity of its administration. It is likely that this practice will be continued.

No provisions have so far been laid down in regard to the selection and appointment of staff. It is obvious that, as public corporations increase in number and importance, certain standard practices will have to be developed in regard to recruitment, security of tenure, status and conditions of employment. What is needed is a commercial public service as a counterpart to the Civil Service.[4]

3. CONDITIONS OF EMPLOYMENT

While there are no provisions as to the recruitment and selection of the personnel of the public corporations, all the Acts concerning commercial public corporations have specific provisions concerning conditions of employment and service. The following provision is repeated, in almost identical form, in different Acts: 'It shall be a duty of the board to enter into consultation with organisations appearing to them to represent substantial proportions of the persons in the employment of the board, or of any class of such persons, as to the board's concluding with those organisations agreements providing for the establishment and maintenance of joint machinery for

[4] The Act constituting the T.V.A prescribes that 'in the appointment of officers and the selection of employees for said corporation, and in the promotion of any employees or officers, no political test of qualification should be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency' (s. 6). This has been rigidly adhered to, and the T.V.A. has, in the more than thirteen years of its existence, trained and developed a highly efficient type of public service personnel. Though it does not hold examinations comparable to the Civil Service Commission, it invites applications from colleges and other institutions including professional organisations. The personnel department keeps detailed records. In the words of Finer (*The T.V.A. Lessons for International Application*, p. 139): 'The T.V.A. approaches business rather than Civil Service practice in the appointment of its personnel'. Robson (*Public Enterprise*), on the other hand, recommends integration of the personnel of the public corporation with the regular Civil Service including examinations. Examinations and a clear public status may well prove necessary as public corporations develop; but integration with the Civil Service would probably be a danger to the special character of the public corporation.

(*a*) the settlement by negotiation of terms and conditions of employment, with provision for reference to arbitration in default of such settlement in such cases as may be determined by or under the agreements; and (*b*) consultation on (1) considerations relating to the safety, health and welfare of such persons, (2) the organisation and conduct of the operations in which such persons are employed and other matters of mutual interest to the board and such persons arising out of the exercise and performance by the board of their functions.' [5]

This means that the different boards of the public corporations are put in the same position as employers or employers' organisations for the purpose of the collective bargaining machinery. Employees will be represented by the trade unions most representative of their particular trade or industry. The whole machinery gradually developed for the organisation of industrial labour conditions, including the establishment of joint industrial and wages councils, reference to the Industrial Court, etc., will apply to the nationalised industries. There is, of course, a deep sociological difference in that the boards, as employers, indirectly represent the State. They should, therefore, and are likely to take the lead in any principles of labour and wages policy which the Government of the day favours; for general directions to that effect are no doubt within the powers of direction of the competent Minister. Legally, however, the difference will not make itself felt for some time. The boards of the public corporations have the same position as the management of any private employer. For purposes of collective bargaining it will be a simplification that the employer in this case invariably represents the entire industry.

Among the commercial public corporations it is only the airways corporations which are faced with a certain amount of competition from private enterprise. The Civil Aviation Act therefore provides that, except where conditions are regulated by another enactment, by a collective agreement or by the decision of a joint industrial council, any independent undertakings providing air transport services or carrying out, other forms of aerial work shall be compelled to adopt terms and conditions no less favourable for persons engaged in

[5] Section 46, Coal Industry Nationalisation Act; cf. s. 99, Transport Bill; s. 74, Electricity Bill; s. 19, Civil Aviation Act.

comparable work than are observed by the three airways corporations, or, where they are not all engaged in the same kind of work, by at least one of them. Disputes of the questions arising from this are to be submitted by the Minister to the industrial court for settlement.

This provision illustrates a particular aspect of the growing tendency to make the conditions of labour as agreed between the most representative sections of the industry on both the employers' and the workers' side, binding upon the whole industry.[6]

Some of the Acts further contain specific provisions on pension schemes. The working out of such schemes is left to regulations to be made by the Minister. In this connection provisions are made for the maintenance of any existing pension rights for staff taken over from nationalised undertakings.[7]

Provisions of great practical and legal importance give to those public corporations which take over nationalised industries for private enterprise the right to terminate certain service contracts of personal service. The general principle is that the public corporations succeed to contracts privately made by undertakings which they have taken over. The boards have, however, been given limited rights to get rid of obnoxious contracts. They have the right of disclaiming agreements, including contracts of personal service 'where the making, or, as the case may be, the variation of any agreement of the body . . . was not reasonably necessary for the purposes of those of the activities of the body to which it relates, or was an act of unreasonable imprudence on the part of the body . . .'.[8]

In such cases the agreement is deemed by law to have been frustrated on the date of the transfer and the parties to have been discharged from their further performance.

This provision is not likely to have any practical significance in regard to collective agreements between the private managements and employers' organisations. It is aimed at certain

[6] This was well developed in pre-Nazi German labour law where collective agreements could be made binding upon the whole industry. For Swedish law, cf. Adlercreutz, 10 MOD.L.REV. 150.

[7] Cf., in particular, ss. 102–104, Transport Bill; also s. 20, Civil Aviation Act; s. 48, Electricity Bill; s. 37, Coal Industry Nationalisation Act.

[8] Section 15, Transport Bill. Cf. s. 7, Coal Industry Nationalisation Act, in connection with Second Schedule to the Act and S.R. & O., 1946, No. 1946.

extravagant contracts of service, indemnification or pensions entered into between some of the undertakings and high-ranking executives, sometimes as an insurance against impending nationalisation.

This type of provision is also of great general importance, as an instance of a power of interference with contractual rights and liabilities in the interests of public policy.[9]

Advisory Councils

The public corporation is not under the control of a shareholders' meeting. Theoretical though the control of shareholders is today in the case of most companies, the link established between the public corporations and Parliament, through the Minister responsible for the public corporation, does not establish sufficient contact between the public corporation and the public. A series of advisory councils or committees has been constituted for the specific purpose of giving independent advice to the Minister on behalf of the public in general or of such groups of the public as are particularly interested in the enterprise concerned. Although the type and composition of these advisory councils varies according to the nature of the industry or enterprise concerned, a general pattern can be discerned. The advisory councils are appointed by the Minister 'as the Minister may think fit' or 'as the Minister may from time to time determine'.[1] But the Minister is directed in the Acts to consult with certain organisations before he makes the appointments.[2] Thus, in the case of the coal industry, an Industrial Coal Consumers' Council and a Domestic Coal Consumers' Council have been established. The Minister is to consult on the appointments 'with such bodies representative of the interests concerned as the Minister thinks fit', and he 'shall have particular regard to nominations made to him by the said bodies representative of the interests concerned of persons recommended by them as having both adequate knowledge of the requirements of those interests and also qualifications for exercising their wide and impartial judgment on the matters to be dealt with by the council generally'.

It is the function of these advisory councils to advise and report to the Minister on the matters on which they are

[9] See further below.

[1] This seems another example of needless diversity in terminology.

[2] See s. 4, Coal Industry Nationalisation Act; s. 6, Transport Bill; s. 7, Electricity Bill.

competent. They are to make annual reports to the Minister, who shall lay them before Parliament. The members of the councils are not full-time officials or employees. But provision is made for a full-time staff of such councils whose remunerations are determined by the Minister with the approval of the Treasury. There are some strange and apparently unnecessary inconsistencies in the constitution of the different committees.

Thus, the Coal Act lays down that the two Consumers' Councils shall consist of persons appointed by the Minister 'to represent the board'. A similar provision does not exist in the case of the three Transport Users' Consultative Committees. The function of these committees to represent the section of the consuming public concerned (including industry) in a position of independence of the board, and with full power to criticise it, seems incompatible with its representing the board. On the other hand, the Transport Bill does provide that the full-time officers and servants of the consultative committees are to be provided by the Transport Commission itself (section 7 (7)). The Coal Industry Nationalisation Act, on the other hand, provides that clerks, officers and staff are to be furnished by the Minister, with the concurrence of the Treasury. This is both more logical and more sensible if the consumers' councils are to have a position of independence towards the boards. These advisory councils may acquire a twofold constitutional and sociological significance: firstly, they represent a first big step in giving organised representation to consumers. Secondly, they may develop into a new type of public authority somewhat akin to a Permanent Royal Commission and fulfilling functions similar to those which special Parliamentary committees have in relation to Government departments. They are, however, strictly advisory in character. The Minister may accept or reject their advice freely.

An altogether different institution is the Air Transport Advisory Council,[3] which is constituted in the form of a tribunal with a legally qualified chairman and which has the function to consider representations from any person 'with respect to the adequacy of the facilities provided by any of the three corporations, or with respect to the charges for any such facilities'. The council has a wide discretion in rejecting representations which they consider as frivolous, vexatious or inexpedient.

[3] Section 36, Civil Aviation Act.

Despite its semi-judicial composition, the council has only the power to make recommendations to the Minister, and it must make an annual report which the Minister shall lay before Parliament, together with a statement of any recommendations submitted by him in consequence, or any recommendations submitted to him by the council. It is difficult to see the reason for this fundamental difference between the Air Transport Advisory Council and the other advisory councils. Both are advisory, but both may have to deal with such matters as charges for goods and services. Nor is it apparent why the Air Transport Advisory Council should be constituted in the form of an administrative tribunal.

4. FUNCTIONS AND POWERS OF THE CORPORATIONS

A comparison of the powers clauses in all the relevant Acts shows that the legislator has chosen wide and elastic formulas giving the corporations almost unlimited scope and discretion.[4]

The formulations are, however, far from identical. The general pattern is that of setting out the specific texture of the public corporation in question. This is followed by provisions specifying a number of particular activities which the public corporation shall be empowered to carry out, but without prejudice to the generality of the powers granted in the section as a whole. To this is added a general powers clause of varying formulation. Thus, the Coal Industry Nationalisation Act provides: 'The board shall have power to do anything and to enter into any transaction . . . which in their opinion is calculated to facilitate the proper discharge of their duties under subsection (i) (which defines the duty of producing and supplying coal) of this section or the carrying on by them of any such activities as aforesaid or is incidental or conducive thereto'. The Electricity Bill chooses a slightly different formulation: '. . . which in their opinion is calculated to facilitate the proper performance of their duties under the foregoing section or the exercise or performance of any of their functions under the foregoing provisions of this section, or is incidental or conducive thereto'. This is followed by a specific restriction on the powers of an Area Board in regard to the manufacture of electrical plant and electrical fittings, which is reserved to the central authority.

The Civil Aviation Act has a different and more complex

[4] Section 3, Coal Industry Nationalisation Act; s. 2 (5), Electricity Bill; s. 2, Transport Bill; s. 2 (2), Civil Aviation Act; s. 2 (2), New Towns Act.

powers clause. It first defines the duty of the three Airways Corporations: 'to provide air transport service and to carry out all other forms of aerial work . . .'. It secondly contains a general powers clause in the following form: 'Each of the three corporations shall have power, such as hereinafter provided, to do anything which is calculated to facilitate the discharge of their functions under the preceding subsection or of any other functions conferred or imposed on the corporation by or under this Act, or is incidental or conducive to the discharge of any such functions'. The Act thirdly gives the Minister the right to define the previously conferred powers for the purpose of keeping the public properly informed as to the nature and scope of the activities of the public corporation; but it is added that 'Nothing in any such order shall prejudice the generality of the powers conferred by the preceding provisions of this section'. The Act fourthly specifically withholds from all three corporations the power to manufacture air frames or aero engines or air screws. The Act fifthly enumerates certain additional powers, again without prejudice to the generality of the powers previously conferred, to acquire auxiliary undertakings. It lastly authorises the Minister to issue an order which limits the powers of any of the three corporations, to such extent as he thinks desirable in the public interest, by making their exercise dependent on a general or special authority given by him. Such order must be laid before Parliament, which may annul it within forty days.

The powers clause of the Development Corporations under the New Towns Act is again different. It firstly defines their objects, and enumerates a number of specific powers to which is added a general clause in the following form: 'To carry on any business or undertaking in or for the purposes of the new town, and generally to do anything necessary or expedient for the purposes of the new town or for purposes incidental thereto'. The Act then specifically excludes the power to borrow money (other than ministerial advances under the Act) and then authorises the Minister to give directions restricting the exercise of any of the powers of the corporation or to give instructions as to the manner of their exercise. But it is further provided: 'Any transaction between any person and any such corporation acting in purported exercise of their powers under this Act shall not be void by reason only that it

was carried out in contravention of such direction unless that person had actual notice of direction '.[5]

The Transport Bill, alone of the laws setting up commercial public corporations, defines the powers of the Transport Commission by way of enumeration, without adding a general and elastic clause of the type mentioned before.

The clauses defining the powers of the non-commercial public corporations are markedly different. This is explained by their essentially different function as auxiliary organs of the Minister in the performance of a social service. Thus, the National Health Service Act provides (section 11) that Regional Hospital Boards shall be constituted ' . . . for the purpose of exercising functions with respect to the administration of hospital and special health services in those areas '. Section 65, Agricultural Bill, defines the function of the Agricultural Land Commission as : ' (*a*) managing and farming land vested in the Minister and placed by him under the control of the Commission; (*b*) advising and assisting the Minister in matters relating to the management of agricultural land and with such other functions as may be entrusted to the Commission by the Act '. Certain functions, such as the acquisition or the disposal of land except where specifically placed under its control, are excluded from the capacity of the Commission, but a general clause similar to those in the Public Utilities Acts gives the commission ' power to enter into such transactions and do all such things (whether or not involving the expenditure of money) as in their opinion are expedient for the proper discharge of their functions '. These functions are, however, much more limited and specific than those of the commercial corporation.

The legal implications of this somewhat chequered pattern of power clauses will be examined below.

5. RESPONSIBILITY TO GOVERNMENT AND PARLIAMENT

(a) *Ministerial Powers of Direction*

The most decisive difference between a commercial company and a public corporation running an industry or a public utility, consists in the power of the Minister to give it policy directions.[6] The public corporation is to be conducted as

[5] Section 2 (3), New Towns Act.

[6] Cf. Economic Survey for 1947 (Cmd. 7046) ser. 26: ' The policy of the socialised industries and services have a substantial effect upon the whole economy and are ultimately subject to Government control.'

nearly as possible as a commercial and profit-making undertaking; but it is ultimately an instrument of national policy. In the case of the social service corporations it goes without saying that the power of direction of the Minister is complete.[7] In the case of the commercial corporations, it has been emphasised time and again in the debates in Committee in Parliament that it is not the intention of the Minister to interfere.[8] But a general directions clause is contained in all the Acts: 'The Minister may, after consultation with the board, give to the board directions of a general character as to the exercise and performance by the board of their functions in relation to matters appearing to the Minister to affect the national interest, and the board shall give effect to any such directions'.[9]

The Minister has a second, hardly less important, power of direction in regard to the financial affairs of the public corporations: 'The board shall establish a reserve fund—

(2) the management of the said fund, the sums to be carried from time to time to the credit thereof, and the application thereof shall be as the board may determine:

Provided that—

(*a*) no part of said fund shall be applied otherwise than for purpose of the board, and

(*b*) the power of the Minister to give directions to the board shall extend to the giving to them, with the approval of the Treasury, of directions as to any matters relating to the establishment or management of the said Fund, the carrying of sums to the credit thereof, of the application thereof, notwithstanding that the directions may be of a specific character.

30. Any excess of the board's revenues for any financial year of the board over their outgoings for that year properly chargeable to revenue account (including, without prejudice to the generality of that expression, purchases in respect of their

[7] Cf., for example, Town and Country Planning Bill, s. 3: 'The Central Land Board shall, in the performance of their functions under this Act, comply with such directions as may be given to them by the Minister. The functions under this Act of the Board, and of the officers and servants, shall be exercised on behalf of the Crown.'

[8] Cf., for example, Parliamentary Debates, May 15, 1946, *Hansard*, vol. 422, No. 139, p. 1957 (Mr. Shinwell): 'This is to be an industrial corporation, untrammelled and unfettered so far as is practical, apart from general ministerial directions, and with complete freedom to pursue its own line as regards the ordinary transactions for which it is responsible.'

[9] Section 3, Coal Industry Nationalisation Act, cf. s. 4, Civil Aviation Act; s. 5, Electricity Bill; s. 4, Transport Bill.

obligations under the two last preceding sections) shall be applied for such purposes as the board may determine:

Provided that—

(*a*) No part of any such excess shall be applied otherwise than for purposes of the board; and

(*b*) The power of the Minister to give directions to the board shall extend to the giving to them, with the approval of the Treasury, of directions as to the application of any such excess, notwithstanding that the directions may be of specific character'.[1]

Parliament has no direct power of direction or interference. Its control is exercised through the constitutional methods of controlling the Government. The exercise of the ministerial powers of direction, both in regard to policy and to the application of the finances of the public corporation, can be criticised by a vote of censure or a move for a reduction in the estimate of the department or in the salary of the Minister.

The counterpart of the ministerial power of direction is the duty of the public corporation to make an annual report to the Minister, who shall lay it before Parliament.

'The board shall as soon as possible after the end of each financial year of the board make to the Minister a report on the exercise and performance by them of their functions during that year and on their policy and programmes, and the Minister shall lay a copy of every such report before each House of Parliament.

The report for any year shall set out any directions given by the Minister to the board during that year unless the Minister has notified to the board his opinion that it is against the national interest so to do'.[2]

The general power of the Minister, and thus indirectly of the Cabinet, to give directions is a logical expression of the principle underlying the public corporation which carries out national policy in the form of an autonomous legal and commercial enterprise. The duty to report to the Minister and

[1] Sections 29, 30, Coal Industry Nationalisation Act; s. 17, Civil Aviation Act; s. 38, Electricity Bill; s. 96, Transport Bill (with the additional direction that one of the purposes of the general reserve shall be the prevention of frequent fluctuations in the charges).

[2] Coal Industry Nationalisation Act, s. 54.
See also Civil Aviation Act, s. 22.
The New Towns Act (s. 13) contains a similar provision but without the power of the Minister to direct the board to exclude directions which he deems to be against the national interest to disclose to Parliament.

through him to Parliament is equally logical, but it is a grave detraction from the principle of Parliamentary sovereignty and of the accountability of the Minister to Parliament that it should be in the power of the Minister to withhold from Parliament—which is supposed to be his master—directions given to a board.[3]

6. FINANCIAL STRUCTURE

The public corporations have no shares. Their assets are owned by the nation which has delegated the administration to a board controlled to a greater or lesser extent by the Minister who is responsible to Parliament. It is clear that a public corporation can have no private shareholders, but it has always been a matter for some controversy whether the public corporation, national or international, should be financed by Parliamentary grants (or, in the case of international public corporations, by contributions from Governments) or whether it should finance itself through the issue of interest-bearing stock. The latter method has been chosen by the new British Nationalisation Acts. Of the commercial public corporations only the Airways Corporations may receive and are to some extent financed by Exchequer grants. In their case the Act provides for initial grants which may be extended until the financial year expiring on April 1, 1956. The grants are dependent upon the revenue position of the corporations and the discretion of the Minister, exercised in conjunction with the Treasury. This may be explained by the fact that the Airways Corporations are essentially undertakings developing a new service.

The other commercial public corporations, on the other hand, acquire going concerns, in the form of assets, such as collieries, railways, lorries and land vested in them. All commercial public corporations are empowered to finance themselves by the issue of stock. Only in the case of the National Coal Board is such stock Government stock, that is to say, stock of which the principal and the interest thereon shall be charged on the Consolidated Fund.[4] In the case of Civil

[3] The British Public Corporation is thus in a position radically different from the American T.V.A. The latter is financed by Congressional appropriations and is subject not only to the executive control of the President, but to the permanent control of Congress, as well as to the audit of the Comptroller-General. It is inherent in the different method of financing as well as in the differences of constitutional structure that the responsibility of the British Public Corporation goes to Parliament through the Cabinet only.

[4] Section 21, Coal Industry Nationalisation Act.

Aviation, Electricity and Transport the stock is corporation stock, but the Treasury may guarantee, ' in such manner and on such conditions as they think fit, the redemption or repayment of, and the payment of any interest on . . .' any such stock.

In the case of two of the corporations, power is given to the Minister to make advances to the corporations within limits stipulated by the Acts for the purpose of enabling the boards to defray expenditure properly chargeable to capital account.[5]

Lastly, all commercial public corporations are given the power to borrow temporarily ' with the consent of the Treasury or in agreement with the terms of any general authority given by the Treasury by way of overdraft or otherwise such sums as the corporations may require for meeting their obligations or discharging their functions under the Act '.[6]

The constitutional significance of these various financial provisions is as follows: (a) Government stock (in the case of the Coal Act) and the guarantee given by the Treasury in regard to the stock of the other public corporations, is a charge on the Consolidated Fund. These are not subject to annual debate and vote.

(b) Where an Exchequer grant is given (in the case of the Airways Corporations) the charge is also on the Consolidated Fund, but in view of the special nature and significance of these grants, it is provided that (1) the undertakings and all property and revenues of the corporations concerned shall be charged with the repayment of any sums so issued out of the Consolidated Fund, including interest thereon at such rates as the Treasury may determine[7]; (2) where any sum is issued out of the Consolidated Fund the Treasury must lay before each House of Parliament an account of that sum and any payments made by way of repayment or interest.

(c) As regards advances made by Ministers under statutory powers, their discretion is only limited by their general accountability to Parliament, but they must lay before Parliament a statement of any payments due to them from the boards which are not duly paid.

In return for any advances made the Minister may give

[5] Cf. Coal Industry Nationalisation Act, s. 26; s. 12 New Towns Act.
[6] Civil Aviation Act, s. 7; Coal Industries Nationalisation Act, s. 27; Transport Bill, s. 92; Electricity Bill, s. 34.
[7] Civil Aviation Act, s. 9.

directions as to the repayment of advances and the payment of interest, and he has also the power of direction over any surplus revenue.[8]

The details of the financial operations of the public corporations are therefore remote from Parliamentary control. They are subject to Treasury control in so far as the Treasury lays down the terms of guarantees. They are subject to closer ministerial control in so far as the Minister makes advances. Finally, in the case of the Airways Corporations, more detailed information of Exchequer grants must be given to Parliament.

7. AUDITING AND ACCOUNTING

One of the main reasons for conducting nationalised industry and utilities in the form of public corporations is their obligation to observe commercial forms of accounting and auditing.

Three types of accounting must be distinguished, which reveal again the basic difference between the public corporations primarily of a commercial and industrial character, and those primarily of a social service character.

(a) The commercial public corporation must keep proper accounts and audits for which the standard clause is as follows[9]: 'The board shall keep proper accounts and records in relation thereto and shall prepare in respect of each financial year of the board a statement of accounts in such form as the Minister may direct, being a form which shall conform with the best commercial standards'. Further provisions lay down that the accounts shall distinguish between the different activities of the boards (such as colliery activities and ancillary activities of the National Coal Board).

These accounts are audited by auditors appointed annually by the Minister. The auditors must send copies of the accounts, together with the audits, to the Minister, who shall lay a copy of such statements and reports before Parliament.

Considerable discussions took place over the question whether these audits should be examined by the Comptroller and Auditor-General. The Government resisted amendments of the Opposition to this effect essentially on the grounds that these public corporations are commercial undertakings, whose audits should be conducted according to commercial principles.

(b) The Central Land Board, which is charged with the

[8] Coal Industries Nationalisation Act, s. 30, quoted above, p. 247.
[9] Coal Industries Nationalisation Act, s. 31; Civil Aviation Act, s. 21; Electricity Bill, s. 41; Transport Bill, s. 98.

compulsory acquisition of land for development and the raising and collection of development charges on behalf of the Minister for Town and Country Planning,[1] is an example of a public corporation so closely linked with the Minister himself that there is no provision for separate accounting. Section 3 underlines its dependence on the Minister by providing not only that the board shall comply with such directions as may be given to them by the Minister, but by stating—for which there is no parallel in any other account—that the functions of the board and of their officers and servants 'shall be exercised on behalf of the Crown'.

The Agricultural Land Commission, charged, under the Agricultural Bill, with the management and farming of land controlled by the Minister, is in a position of slightly greater independence, and it is charged with the making of annual reports on the discharge of its functions to the Minister, who shall lay such reports before Parliament[2]; but there is no provision for separate accounting and auditing.

These two corporations are therefore essentially a form of ministerial activity.

(c) Some social service corporations have sufficient managerial and financial autonomy to make them liable to separate accounting. The New Towns Development Corporations and the Regional Hospital Boards are treated substantially alike. Both have to handle considerable funds, equipment and personnel. Both types of public corporation must keep proper accounts, and prepare annual accounts in respect of each financial year as directed by the Minister, with the approval of the Treasury. The accounts are audited by an auditor appointed annually by the Minister. These accounts must be submitted by the Minister to the Comptroller and Auditor-General, who examines and lays them before Parliament, together with his report. The development corporations are also charged with the duty of making a separate annual report dealing generally with their operations, to the Minister, for submission to Parliament.

The fact that, in the case of these public corporations, accounts are examined by the Comptroller and Auditor-General indicates that, while they are prolonged arms of the Minister in the fulfilment of a social service, their operations are

1 Section 2 (41, 63, 67) Town and Country Planning Bill.
2 Section 67, Agriculture Bill.

considered of a sufficiently complex and commercial character to demand separate accounting and auditing.

(d) As has already been stated, the Acts provide for various powers of advancing money to public corporations, as well as for Treasury guarantees of the repayment of and the interest on stock issued by the public corporations. The charges following from these provisions are on the Consolidated Fund and therefore not subject to the annual debate and vote on service estimates, but varying provisions—far from uniform—have been made to ensure a form of control over the obligations thus incurred.

1. In the case of any sums issued out of the Consolidated Fund, whether for purposes of ministerial advances to a public corporation or as fulfilment of a guarantee, separate statements must be made by the Treasury to Parliament.[3]

2. In the case of the advances authorised by the Coal Industry Nationalisation and New Towns Acts, the Minister must lay separate accounts of sums received by him, whether for advances to the corporations or whether by way of repayment from them, and these accounts are examined by the Comptroller and Auditor-General, who makes a report to Parliament.[4]

3. The Civil Aviation Act provides the only example of special Exchequer grants to the three corporations for an initial period. Detailed provisions are made on the conditions determining the necessity and estimate of such grants. These grants are clearly subject to Parliamentary control in the same way as the Budget. Section 16 provides that 'all sums payable by the Minister in accordance with the preceding provisions of this Act shall be defrayed out of monies provided by Parliament'.

The following general picture emerges from the variety of accounting and auditing provisions dispersed through the different Acts:—

(i) Most, but not all, public corporations are under duty to make separate accounts properly audited.

(ii) In the case of the New Towns Development Corporations and the Regional Hospital Boards all accounts go from the Minister to the Comptroller and Auditor-General, who reports to Parliament.

[3] Section 26, Coal Industry Nationalisation Act.
[4] Section 35 (2), Coal Industry Nationalisation Act; s. 13 (5), New Towns Act.

(iii) In the case of Public Utilities and Industrial Corporations (Coal, Electricity, Transport, Civil Aviation) the accounts are audited according to commercial standards but go to the Minister, and from him direct to Parliament, without auditing by the Comptroller and Auditor-General.

(iv) In so far as advances, payments or repayments out of the Consolidated Fund to public corporations or from a public corporation into the Consolidated Fund are concerned, the Treasury must lay separate statements before Parliament, and the accounts of the Minister on the receipt and use of such monies go through the audit of the Comptroller and Auditor-General.

(To be concluded)

W. FRIEDMANN

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION: 1942–1946

In July, 1942, *The Modern Law Review* published an article by the present writer which attempted to summarise the powers which the Congress of the United States has vested in the Securities and Exchange Commission under a series of enactments and to indicate the policies which the Commission had adopted in carrying out those powers and the results which it had achieved—particularly in the field of investor protection. That article covered the period from the enactment of the first of the statutes in question, the Securities Act, in 1933, to approximately the close of the year 1941. The present article is concerned with the activities of the Commission since 1942 and with the extent to which those activities have been approved or disapproved by the courts.[1] The Commission has been vested with administrative functions by six different statutes, and with important advisory functions by a seventh.[2]

THE SECURITIES ACT

The primary purpose of the first statute, the Securities Act of 1933,[3] is to give purchasers of new issues of securities full information about the issue and the issuer. Although the Act is modelled to some extent on those sections of the British Companies Act which relate to prospectuses, it differs widely from its British prototype in requiring that the statements which are to be made in the prospectus be incorporated also in a registration statement, which must be filed with an administrative agency, and by giving that agency power to issue stop-orders suspending the right to sell securities, if it finds that the registration statement fails to comply with the Act or with regulations made pursuant to the Act.

An important development since 1941 with respect to registration of security issues under this Act has been the

[1] The Commission's Tenth Annual Report (hereinafter referred to as Tenth Report) is a survey of its activities for the ten-year period 1934—1944. For an account of some of its recent activities, written by its then Chairman and two members of its legal staff, see 'Enforcing the Accountability of Corporate Management and Related Activities of the S.E.C.', (1946) 32 *Va. Law Rev.* 497.

[2] A comparison between certain of the provisions of these statutes and recent recommendations for amendment of the British Companies Act may be found in Dodd, 'Report of the Committee on Company Law Amendment', (1945) 58 *Harv. Law Rev.* 1258.

[3] 15 U.S.C. §§ 77a *et seq.*

Commission's success in preventing evasion through the sale of what are in substance investment securities masquerading as mere assignments of interests in tangible property. The most noteworthy of these successes was scored in *S.E.C.* v. *Joiner*,[4] in which the Supreme Court accepted the Commission's view that what purported to be assignments of leases of parcels of land which might possibly contain oil were within the Act since they were represented by the assignors to be, in effect, investments in an oil-drilling project.

Some idea of the volume of work performed by the Commission and its staff in connection with registration may be obtained from the fact that during the period from the enactment of the law through June 30, 1944, 5,420 registration statements were filed with the Commission.[5] These statements are given very thorough scrutiny. During the same period that scrutiny resulted in the issue of 182 stop or refusal [6] orders, as well as an unstated but undoubtedly very much greater number of letters of deficiency.[7]

In an effort to leave no loophole for concealment of material facts, the Securities Act calls for a much more elaborate registration statement and prospectus than is required by the British Companies Act. The Commission is, however, given a considerable amount of discretion with respect to these requirements,[8] a discretion which it is currently using for the purpose of simplifying both registration statements and the subsequent periodic reports which are required of registrants. Congress has recently taken cognisance of criticisms that registration requirements are unduly expensive in the case of issues of

[4] 320 U.S. 344 (1943).

[5] Tenth Report, p. 18. The total face value of new corporate securities registered under the Act during the ten-year period ending June 30, 1944, was over $14,000,000,000. This was approximately two-thirds of the total volume of such securities issued in the United States during the period. Most of the balance were either securities of railroad companies, the issue of which is regulated by the Interstate Commerce Commission, or securities which were exempt from registration because they were not publicly offered but were privately placed, mostly with insurance companies and other institutional buyers. Tenth Report, p. 19.

[6] A refusal order is substantially like a stop order, but may be issued only where the registration statement is incomplete or inaccurate on its face and only within ten days after the filing of the statement. A stop order may be issued at any time.

[7] The 'letter of deficiency', a letter which informally advises registrants of misstatements or omissions which must be corrected or supplemented before the registration statement becomes effective, has substantially superseded the stop order as a method of enforcement.

[8] Securities Act, § 7, 15 U.S.C. § 77g.

small amounts of securities, and has empowered the Commission to exempt from the Act issues which do not exceed $300,000.[9]

In addition to requiring disclosure through the medium of registration statements, the Securities Act contains a broadly-worded prohibition against frauds in the sale of securities and gives the Commission power to investigate such frauds and bring injunctive actions to restrain them.[1]

The Commission has made vigorous use of these powers. It has been greatly assisted in so doing by the broad construction which the courts have given [2] to the power of subpœna which Congress conferred upon it for the purpose of facilitating such investigations,[3] though it has complained that it has at times been seriously hampered by the delays which are involved in obtaining judicial enforcement of its subpœnas.[4]

THE SECURITIES EXCHANGE ACT

The primary objective of the Securities Exchange Act [5] of 1934 is the regulation of sales of securities both on stock exchanges and in over-the-counter dealing. The Act requires the registration of stock exchanges and the registration of securities listed thereon, authorises the Board of Governors of the Federal Reserve System to limit the amount of credit that may be extended on any registered security, requires the registration of brokers and dealers who carry on operations in the over-the-counter market, permits the Securities and Exchange Commission to deny or revoke such registration, and prohibits manipulation of security prices and the use, in security transactions, of any device which has been condemned as manipulative or deceptive by rules established by the Commission. It also imposes a variety of restrictions on corporations whose securities are registered on a national securities exchange and on their officers, directors and principal shareholders.

Most of these restrictions are closely connected with the Congressional objective of turning security exchanges into

[9] Act of May 15, 1945, c. 122, 59 Stat. 167. The original Act limited the Commission's power of exemption to issues not exceeding $100,000. Securities Act, § 3, 15 U.S.C. § 77c.

[1] For an interesting example of such an injunction see *Time Trust, Inc.* v. *S. E. C.*, 130 F. 2d 214 (C.C.A. 9th, 1942), s.c. 142 F. 2d 744 (C.C.A. 9th, 1944).

[2] *S. E. C.* v. *Penfield Co.*, 143 F. 2d 746 (C.C.A. 9th, 1944); *McGarry* v. *S. E. C.*, 147 F. 2d 389 (C.C.A. 10th, 1945).

[3] Securities Act, § 19(b), 15 U.S.C. § 77s(b).

[4] Tenth Report, p. 28.

[5] 15 U.S.C. §§ 78a *et seq.*

markets in which the public can buy and sell on the basis of adequate information and with a minimum risk that prices will have been fraudulently or unfairly manipulated, but other provisions are only remotely related to that objective. Included among the former are requirements for detailed financial statements at the time of registration of a security by an issuer and for the supplementing of the original statement by such annual financial reports as the Commission may prescribe (such reports to be available to the public, except where the Commission for cause permits some portion of a report to be treated as confidential), and a provision that, in order to prevent the unfair use in trading in equity securities [shares] of information possessed by officers, directors and large shareholders, all profits realised by the latter through short-term trading shall inure to the benefit of the issuing corporation and be recoverable by it.[6] A requirement which is more remotely related to the statute's primary objective is one making it unlawful to solicit proxies in respect of any registered security except in accordance with such rules as the Commission may prescribe.[7]

Many of the Act's provisions depend wholly or largely on action by the Commission for their effective implementation. Such is the case with respect to the proxy provisions and the requirement of annual reports by security issuers. Neither requirement became effective until the Commission had made rules governing solicitations and reports. Now that it has done so, the Commission's staff scrutinise the solicitations and reports which are made to insure that the rules are in fact complied with. The volume of the Commission's activity in supervising compliance with its proxy regulations is indicated by the fact that during the fiscal year ending June 30, 1944, the staff examined preliminary and definitive material relating to some 1,501 proxy solicitations, 1,472 of which were made by persons connected with the management of the corporation.[8]

The Commission's rules governing these matters have not been radically changed during the last five years. The proxy rules were, however, somewhat modified by an amendment which became effective January 15, 1943. The more important changes were a requirement of more complete disclosure as to

[6] Securities Exchange Act, § 16, 15 U.S.C. § 78p. The Public Utility Holding Company Act and the Investment Company Act have similar provisions, applicable to corporations which are required to register under those Acts. To facilitate enforcement of these provisions, officers, directors and large shareholders are required to file with the Commission monthly reports of their shareholdings.

[7] Securities Exchange Act, § 14, 15 U.S.C. § 78n. The Public Utility Holding Company Act and the Investment Company Act contain similar provisions.

[8] Tenth Report, p. 53.

compensation of directors and officers, a requirement (in cases of proxies solicited by management for use at a meeting at which directors are to be elected) of an adequate annual financial report, and a requirement that management include in its own soliciting material any proposal by a security holder which is ' a proper subject for action by the security holders '.[9]

In the writer's opinion, the most important recent developments in the administration of the Securities Exchange Act by the Commission are those which relate to fraud and manipulation. A provision of the Act, which is supplementary to the anti-fraud provision of the Securities Act, forbids brokers and dealers to effect any transaction involving use of the mails or any instrumentality of interstate commerce [1] ' by means of any manipulative, deceptive or other fraudulent device, or contrivance ', and empowers the Commission to define such devices by regulation.[2]

The Commission adopted a rule on the subject couched in very general terms as early as 1937. Since that time, it has been engaged in working out the implications of those general terms chiefly by means of opinions which it has written in proceedings for the revocation of the registration of offending brokers or dealers. In *Matter of Duker and Duker*,[3] decided in 1939, it took the position that a wide discrepancy between the price charged a customer and the established market price is proof that the sale has been made by means of a deceptive device. It has continued to adhere to that position, and in the *Hughes Case*,[4] decided in 1943, it succeeded in getting its view upheld by a federal circuit court of appeals. ' The essential objective of securities legislation ', said the court, ' is to protect those who do not know market conditions from the over-reachings of those who do '.[5]

It was assumed by the court in that case that the relationship between the parties was one of buyer and seller. In some other cases, in which the price charged the customer was the market ' asked ' price and the dealer's profit was limited to the spread between that price and the market ' bid ' price,

[9] Rule X, 14a 7.

[1] The constitutional power of the federal government to legislate in this field is based on its power over the mails and its power to regulate interstate commerce.

[2] Securities and Exchange Act, § 15(c), 15 U.S.C. § 78(c).

[3] 6 S.E.C. 386 (1939).

[4] *Hughes & Co.* v. *S.E.C.*, 139 F. 2d 434 (C.C.A. 2d, 1943). The decision was based in part on a finding that the dealer's conduct violated § 17 of the Securities Act (15 U.S.C. § 77q).

[5] *Ibid.* p. 437.

the Commission has found a violation of the statute and of its own rule by finding that the dealer was an agent of the buyer rather than a seller and then treating him as subject to an agent's duty not to make any undisclosed profit.[6] It has held that the fact that the dealer, after completing the transaction, has sent the customer a memorandum describing himself as a principal does not prevent him from being in fact an agent where the dealer has solicited orders for securities which he did not own, the solicitation of such orders being treated as sufficient to indicate an agency relationship. One may question the Commission's assumption that it has found an infallible touchstone for distinguishing between an agent and a seller without questioning its actual holdings, which are that it is improper for a security dealer to obtain a ten per cent. profit on a riskless transaction from a customer who is ignorant both of the amount of the profit and of the riskless character of the transaction.

Subsection 20 of the Securities Exchange Act, on which the regulation just considered is based, applies to both purchases and sales, but is limited to transactions by brokers or dealers. Subsection 17 of the Securities Act, which applies transactions by any person, is limited to fraud in the sale of securities and has no application to purchases. Although subsection 10 (*b*) of the Securities Exchange Act authorises the Commission to adopt regulations forbidding the use by any person of any manipulative or deceptive device or contrivance in connection with either the purchase or the sale of any security,[7] the Commission made no attempt to implement this authorisation until May 21, 1942, when it adopted a rule which, like its broker-dealer rule, was phrased in very general terms.

The Commission has given a broad interpretation to this rule, construing it as forbidding purchases by corporate officers and directors which are made without full disclosure of material facts. It considers the rule to be applicable not only to cases in which the officer or director is himself the purchaser, but to cases in which the purchase is made for the corporation, at least if the officers and directors are the principal shareholders,

[6] *Matter of Oxford Co.*, S.E.C. Securities Exchange Act, Release No. 3769 (Jan. 4, 1946); *Matter of Norris & Hirshberg, Inc.*, S.E.C. Securities Exchange Act Release No. 3776 (Jan. 24, 1946). For a fuller treatment of this subject see Lesh. 'Federal Regulation of Over-the-Counter Brokers and Dealers in Securities', (1946) 59 *Harv. Law Rev.* 1237.

[7] Provided some use is made of the mails, of some instrumentality of inter-state commerce, or of some facility of a national security exchange.

so that the purchase, if made at less than fair value, will substantially benefit them.[8]

The scope of this rule, as interpreted by the Commission, is indicated by the case of *S.E.C.* v. *H. P. Mueller*,[9] in which a consent judgment was entered in the Commission's favour. The president of a company had been offering the holders of the company's common [ordinary] shares $2 a share for their holdings. In making the offers he correctly stated that under the company's articles no dividends could be paid on the common shares until the preferred shares were retired. He did not disclose that the book value of the common was $43 per share and its current asset position $16, that current net earnings in excess of preferred dividend requirements were $4 per common share and that he had refused to sell his own shares at less than their book value.[1]

Assuming that the Commission's interpretations of the statute and of its own rule are correct, the only legal consequence (apart from possible liability to criminal prosecution) would seem to be that the Commission may obtain an injunction against further acts of the same sort. Corporate officers, unlike dealers, have no registrations which the Commission can revoke and the statute says nothing about restitution. The Commission has, however, succeeded in several cases in having a provision for restitution embodied in a consent decree.[2]

THE PUBLIC UTILITY HOLDING COMPANY ACT

The third in date of enactment of the statutes which the Commission administers, the Public Utility Holding Company Act of 1935,[3] is limited in scope to part of a single industry. The Act covers only gas and electric utility holding companies and the subsidiaries of such companies.[4] On the other hand, with respect to the companies whose activities come within its purview, it gives the Commission much broader powers than those granted by either the Securities Act or the Securities Exchange Act.

[8] *Matter of Ward La France Truck Corp.*, S.E.C. Securities Exchange Act Release No. 3445.
[9] U.S.Dist. Ct. (E.D.Wis. 1945), not reported.
[1] 32 *Va. Law Rev.* 497, note 1, *supra*, at p. 552.
[2] See Note (1946) 59 *Harv. Law Rev.* 769.
[3] 15 U.S.C. §§ 79 *et seq.*
[4] Even at the time when the Act was adopted a substantial percentage of the industry was operated by companies which were not owned by or affiliated with any holding company. The effect of action taken pursuant to the 'integration' provisions of the Act has been greatly to increase the number of such companies.

At the time of the adoption of the Holding Company Act, the greater part of the electric power and gas utility industry of the United States was under the control of holding companies. Many of these were organised in such manner that there were a series of intermediate holding companies separating the top holding company, which controlled the entire system, from the operating companies. Not only the operating companies, but the holding companies and sub-holding companies usually had complicated capital structures, consisting of bonds or debentures,[5] preferred [preference] shares and common [ordinary] shares. Voting control of the system was by one means or another usually vested in persons who owned only a minute fraction of the capital invested. The operating companies were separated from one another geographically. Very serious abuses had developed, injurious alike to investors and consumers.

Confronted with this situation, Congress enacted a statute which has two distinct purposes. One section of the Act, referred to by unfriendly critics as the 'death-sentence',[6] is retroactive, and requires the undoing of much that has been done in the past. Its objectives are two-fold. On the one hand, it seeks to achieve geographical integration of the holding company systems by requiring the sloughing off of isolated parts of the systems.[7] On the other hand, it seeks to readjust the highly pyramided structures of the more complicated systems so that, when simplification is complete, there will be no more than two tiers of holding companies superimposed upon the operating companies, and no holding company will have a capital structure which is, in the opinion of the Commission, either undesirably complex or inequitable in the manner in which it distributes voting power among the various classes of security holders.

The other sections of the Act have a prospective, rather than a retroactive, effect. They subject the holding companies

[5] In the United States, only unsecured long term debt issues are called debentures. Such issues, if secured, are called bonds.

[6] Section 11, 15 U.S.C. § 79k. For a fuller account of the Commission's administration of this section, see Blair-Smith & Helfenstein, 'A Death Sentence or a New Lease on Life?', (1946) 94 *U. of Pa. Law Rev.* 148.

[7] This sloughing off does not necessarily involve the sale of the properties to outsiders. The Commission has power to treat the distribution among the holding company's security holders of the securities of operating companies which are not integrated parts of the system as a sufficient compliance with the statute. As of June 30, 1944, twenty subsidiaries had been separated from the systems by exchange or distribution of their securities and 246 such subsidiaries had been taken out of the systems by sales of their properties. Tenth Report, p. 190.

and their subsidiaries to a wide-ranging regulation by the Commission, which includes supervision over such matters as the issue of securities, the alteration of the rights of security holders, the acquisition by a corporation subject to the Act of utility assets or securities of other companies, the entering into transactions by and between companies in the same system, or by and between a company and its directors, officers or principal shareholders, the payment of dividends and the retirement, redemption or acquisition by a company of its own securities.

Congress has instructed the Commission to require each holding company [8] to ' take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among the security holders, of such holding-company system '.[9] The holding company need not wait for the Commission to act, but may submit its own plan, which the Commission must approve if it finds the plan necessary to effectuate the provisions of the statute with respect to simplification [1] and ' fair and equitable to the persons affected by such plan '.[2]

The Commission has had little difficulty in determining the degree of simplification which it regards as necessary. A majority of the holding companies with which it has had to deal have had large issues of cumulative preferred shares on which substantial amounts of dividends have accrued, making it impossible for the companies to sell additional common shares.[3] In such cases, unless the liquidation of the holding company is necessary or desirable, either as a means of complying with the ' great-grandfather ' clause [4] of the Act or otherwise, the Commission's practice has usually been to leave the holding company in existence but to insist on a recapitalisation of it which will result in the substitution of common shares for its entire preferred issue.

[8] Simplification may be required of a subsidiary which is not itself a holding company only if it is required for the purpose of equitably distributing voting power among its security holders.

[9] Section 11 (b) (2).

[1] Or integration, if the plan is one for achieving integration.

[2] Section 11 (e).

[3] As of December 31, 1940, nearly 60 per cent. of holding company preferred share issues had dividend accruals, the accruals amounting to $476,000,000 or nearly 30 per cent. of the par value of those preferred issues on which dividends were in arrears. Tenth Report, p. 87.

[4] A provision of § 11b(2) which requires that there shall not be more than two tiers of holding companies superimposed upon operating companies.

The Commission has found it a good deal harder to determine questions of fairness in the distribution of the new common shares—to decide, for example, whether in a particular case a plan which gives 95 per cent. of the new common to the holders of the old preferred and 5 per cent. to the holders of the old common is 'fair and equitable'. In *Matter of Federal Water Service Corporation*,[5] a majority of the Commission took the position that fairness requires that the holders of old common receive a portion of the new, if there is a substantial chance that, had the old capital structure remained unchanged, accrued dividends would ultimately have been paid off and the common would have participated in dividends paid thereafter. The fact that the Act requires a change in the capital structure of the holding company was deemed immaterial, since it requires that the change be made in a manner which is fair and equitable to all classes of security holders. The Commission said that the common should not be denied participation merely because the company's prospects were sufficiently uncertain so that the present value of its net assets could not reasonably be said to equal the liquidating preferences of the preferred shares. It insisted that the amount which would be due the preferred in liquidation, an event which had not happened and was not likely to happen, had little bearing on the extent to which the preferred shareholders were equitably entitled to participate in new securities distributable under the plan.

The arguments advanced by the dissenting commissioner in opposition to this thesis are not impressive, but what if simplification takes the form of liquidation of the top holding company? If the present value of a holding company's net assets is clearly less than the liquidation preference for which the preferred shareholders have contracted, can it be fair and equitable to distribute some part of these assets to the holders of the old common merely because the common might ultimately have shared in dividends if liquidation had not taken place? Must not the contract be controlling, where the very event designated in the contract has occurred? The Commission has said 'No', and its answer has been approved by a majority of the justices of the Supreme Court.[6]

[5] 8 S.E.C. 893 (1941); 10 S.E.C. (200) (1941). The questions raised by this case and by succeeding cases dealing with fairness of plans are dealt with more extensively in Dodd, 'The Relative Rights of Preferred and Common Plans under the Holding Company Act', (1944) 57 *Harv. Law Rev.* 295, and in Note (1945) 58 *Harv. Law Rev.* 604.

[6] *Otis & Co.* v. *S.E.C.*, 323 U.S. 624 (1945).

No doubt the answer seems astonishing at first sight. Liquidation of the top holding company is, however, normally only one of several possible methods by which simplification of the system may be attained. According to the *Federal Water Service Co.* ruling, which seems unimpeachable, the use of some method of simplification other than liquidation would have entitled the holders of the old common to participate under the plan if there was a substantial likelihood that the common would have ultimately received dividends if the old capital structure had remained unchanged. To make the common shareholders' right to continued participation turn on the particular method of simplification adopted, and to eliminate them simply because the method chosen was the liquidation of the top holding company, rather than (for example) the liquidation of a sub-holding company or its consolidation [amalgamation] with the top holding company, was regarded by a majority of the Commission and by a majority of the court as an unfortunate and an unnecessary result. To the Commission, preservation of what it considers legitimate investment values seems more equitable than literal adherence to contractual provisions. At the time when the preferred shares were issued no one could have anticipated that Congress would later provide for liquidation as one of several alternative methods for simplification and to hold that the use of that method would entitle the preferred to more than they would receive if other methods of simplification were employed would, so the Commission said, be to give the preferred an inequitable windfall.

The Commission soon made it clear that its policy of treating the reasonable expectations of investors as of more importance than the literal performance of their contracts is one which it is prepared to apply in favour of preferred shareholders as well as against them. In *American Light and Traction Co.*,[7] a holding company which was being dissolved pursuant to the Act had outstanding non-callable 6 per cent. preferred shares which, because of their high dividend rate and the strong financial position of the corporation, had an investment value clearly in excess of their liquidation price of $25. Had it not been for the statute, liquidation would have been improbable. The Commission refused to approve the dissolution plan unless it were amended so as to give the preferred shareholders $33 a share. It had previously held in another case

[7] S.E.C. Holding Company Act Release No. 6603 (1946).

that, when a company is liquidated pursuant to the Act, the holders of unmatured debentures which have an investment value in excess of their principal amount must be paid such investment value.[8]

The *Federal Water Service Case*, above referred to, also raised another issue of considerable importance. The Commission claimed the right to refuse to accept the company's simplification plan unless the officers would (on payment of cost, plus 4 per cent. interest) surrender preferred shares which they had purchased while simplification proceedings were pending before the Commission. The case was appealed to the Supreme Court,[9] which handed down an ambiguous opinion which has been differently interpreted by the Commission [1] and by the Court of Appeals for the District of Columbia.[2] The latter interpreted the opinion to mean that if the Commission wishes to treat such purchases by management as improper it can do so only by promulgating a rule ' of which notice is given so that all may know of its existence '.[3] The case is now before the Supreme Court for a second time.

Many holding companies have on their books debt claims for large amounts against their subsidiaries. In the ' *Deep Rock* ' *Case*,[4] the Supreme Court held that a holding company which had, in managing a subsidiary, subordinated the latter's interests to its own, could not assert its debt claims against the subsidiary in competition with other claimants. The Commission has made extensive use of the principle of that case in passing on the fairness of simplification plans of subsidiaries where the parent company claims rights as a creditor.

The geographical integration provisions of the Act, no less than its simplification provisions, have given rise to difficult questions of law. Generally speaking, the Commission has interpreted them in such a manner as to limit a holding company system to a rather compact geographical area, and so as to reduce to a minimum the non-utility properties which it may continue to hold, even within that area. Most of the

[8] *Matter of American P. & L. Co.*, S.E.C. Holding Company Act Release No. 6176 (1945).
[9] *S.E.C.* v. *Chenery Corporation*, 318 U.S. 80 (1943).
[1] *Matter of Federal Water Service Corporation*, S.E.C. Holding Company Act Release No. 5584 (1945).
[2] *Chenery Corporation* v. *S.E.C.*, 154 F. 2d 6 (1945), *cert. granted* 66 Sup. Ct. 1025 (1946).
[3] 154 F. 2d 6, at p. 12.
[4] *Taylor* v. *Standard Gas and Electric Co.*, 306 U.S. 308 (1939), a case relating to the reorganisation of the Deep Rock Oil Corporation.

more important questions of interpretation which this part of the Act raises are presented in the case of *Engineers Public Service Co.* v. *S.E.C.*,[5] in which the Commission's position was only partly sustained by the Court of Appeals of the District of Columbia.

In a number of cases an unintegrated company has complied with the integration provisions in piecemeal fashion by selling the securities of some of its subsidiaries before either it or the Commission has worked out a complete integration plan. In one case in which a company proposed to use the proceeds of such a sale to purchase parts of several issues of preferred shares at prices which the Commission believed to be a very dubious measure of their true value, permission to make the purchase was denied.[6] The Commission insisted that, since the proposal was part of a plan of integration, it was subject to the statutory ' fair and equitable ' standard and that it failed to meet that standard, even though no preferred shareholder was under any obligation to sell.[7]

The ultimate effect of the integration programme envisaged by the Act will be to reduce the size of the pre-existing utility systems to smaller units. Many of these will lose their interstate character and will thenceforth cease to be subject to the Holding Company Act.[8] In the meanwhile, however, the Commission, as we have seen, has broad regulatory powers over the financial side of the activities, not only of the holding companies but of their subsidiaries as well.[9] In exercising the powers which Congress has granted it over such matters as security issues and accounting, it has sought to bring about balanced capital structures in which there is an adequate proportion of common shares, to eliminate inflationary items in property accounts, and to compel provision for adequate depreciation reserves. In approving proposals for bond [debenture] issues, it has insisted on the inclusion of a number

[5] 138 F. 2d 936 (Ct. App. D. C. 1945), *cert. granted*, 322 U.S. 723 (1944).

[6] *Matter of Western Public Service Co.*, 12 S.E.C. 804 (1943).

[7] The proposed prices for the various issues varied from $57 to $68 a share. Three and one-half years later, after an intervening period of good earnings, the Commission found each of the preferred issues to be worth over $100 per share. In the *Matter of Engineers Public Service Company*, S.E.C. Holding Company Act Release No. 7041 (1946).

[8] Of those subsidiaries which had been separated from their parent companies as a result of action taken pursuant to the statute prior to June 30, 1944, 232 companies, with total assets of $2,273,000,000, were no longer subject to the Act and thirty-four companies, with total assets of $1,494,000,000, were still subject to it. Tenth Report, p. 90.

[9] The rates and services of the operating utilities are not regulated by the Securities and Exchange Commission, but in some cases by the Federal Power Commission and in most cases by state utility commissions.

of protective provisions. For example, obligors have usually been required to set aside 15 per cent. of their gross operating revenues for maintenance, replacements or improvements. The issue of additional bonds under an existing trust indenture has been restricted to issues not exceeding 60 per cent. of the fair value of any net additions to fixed property which are to be made through investment of the proceeds of the issue. Similarly, in approving proposals for preferred share issues, the Commission has insisted on certain protective provisions, including the vesting of substantial voting rights in the preferred shareholders and the placing of restrictions on the corporation's power to pay dividends on its common shares.[1]

The Public Utility Holding Company Act, like the Securities Act and the Securities Exchange Act, gives the Commission broad power over accounting practices. In exercising its powers under the two former Acts, the Commission has been cautious about laying down rules which might prove unduly rigid and has rarely acted on any general accounting question without prior consultation with the American Institute of Accountants. It is generally conceded that its influence has been beneficial, though there is considerable justification for the statement made by the former senior member of a leading accounting firm that, ' This benefit has arisen from the enforcement of rules which were laid down [not by statute, but by such unofficial bodies as the American Institute of Accountants] prior to its creation, and from strengthening the position of the accountant in relation to the corporation rather than from the formulation of new rules '.[2] Although there have been some complaints of excessive rigidity and bureaucratic arbitrariness in connection with the implementation of the first two statutes on their accounting side, these have not, for the most part, been complaints against action taken by the Commission itself, but contentions that the Commission's staff, which passes on the conformity of particular statements to the Commission's

1 Tenth Report, pp. 99–103.

2 May, Financial Accounting (1943) 66. The Commission's Tenth Report somewhat exaggerates its contributions to accounting science and practices, but even if it were wholly true, as it is not, that the Commission's sole achievement has been to enforce generally standards previously adopted by some members of the profession, that would be a very substantial accomplishment. That Congress has, and Parliament has not, thought it desirable to vest broad powers over accounting in an administrative agency rather than to leave such matters to the voluntary action of the accounting profession or to incorporate rules recommended by that profession in legislation is due, in part at least, to differences in the status of that profession in the two countries—a difference which is less substantial today than it was in 1933.

standards, has on occasion been unnecessarily rigid in its interpretation and application of those standards.[3]

Public utility accounting differs from other corporate accounting in that, if utility accounting is prescribed either by a commission which has power to regulate the rates charged by the utility or by another commission which is eager to co-operate with the rate-fixing commission, the accounting principles adopted will inevitably be influenced by the rate-fixing commission's views as to whether certain elements of cost or value should, or should not, be treated as property on which the utility should be permitted to earn a return. Although the Securities and Exchange Commission has no rate-fixing powers, it has insisted that all the companies which are subject to the Holding Company Act adopt certain accounting principles established by the Federal Power Commission, regardless of whether the particular company is subject to the rate-making jurisdiction of that Commission. The authority of the Security and Exchange Commission to adopt two of the most controversial of these rules has recently been sustained by a federal court.[4]

THE TRUST INDENTURE ACT

The Trust Indenture Act of 1939 is a much less important statute than the three which have been considered thus far. Its primary purposes are to require the inclusion of certain provisions, chiefly provisions relating to the duties of the trustee, in indentures securing bonds and to require that such trustees be persons or institutions unaffiliated either with the obligor or with the underwriter. It is the Commission's duty to refuse registration of a proposed bond issue pursuant to the Securities Act unless the indenture conforms to these statutory standards and the trustee has the required freedom from entangling alliances with other interests. The standards are rigidly defined in the Act, so that the Commission has little discretion in the matter, except that it has some power to grant exemptions. By the date of its Tenth Report, June 30, 1944, the Commission had, either under this Act or under the Public Utility Holding Company Act, passed on indentures covering more than $4,750,000,000 principal amount of

[3] See *e.g.* Sanders, 'A Review of Reviews of Accounting Progress', (1946) 81 *Jo. of Accountancy* 9. Professor Sanders' article is a comparison of the accounting chapter of the Commission's Tenth Report with the Report of the Committee on Company Law Amendment.

[4] *American Power and Light Company* v. *S.E.C.*, 158 F. 2d 771 (C.C.A. 1st, 1946).

securities, or approximately 80 per cent. of the long-term corporate debt floated since the Act became effective, excluding railroad bonds, which are regulated by another Commission.[5]

THE INVESTMENT COMPANY AND INVESTMENT ADVISERS ACTS

Investment trusts, which in America have generally assumed the corporate form of organisation, were quite rare in the United States until long after they had become common in Great Britain. They did, however, develop very rapidly during the decade of the 1920's. Many of them were well managed, but so many of them were not that the need for regulation came to be generally conceded. In 1935, Congress instructed the Securities and Exchange Commission to make a study of the problem, which was not completed until 1940. In August of that year Congress enacted the Investment Company Act,[6] which embodies many, but by no means all, of the Commission's proposals, and also, on the same day, enacted the Investment Advisers Act.[7]

The Commission has made the following summary of its activities in the administration of the Investment Company Act:

> 'The principal problems faced by the Commission during its administration of the Act can conveniently be grouped into seven categories, namely, (1) determining which companies are investment companies subject to the Act and which are not investment companies or are entitled to exemption; (2) the classification of companies subject to the Act; (3) prescribing the information to be filed with the Commission and that to be transmitted to the security holders and the integration of the required information with that furnished under other Acts administered by the Commission so as to avoid duplication; (4) the administration and enforcement of those provisions of the Act which regulate the relationships and transactions of persons who are affiliated with investment companies; (5) matters relating to the distribution, redemption and repurchases of securities issued by management companies; (6) reorganisations of investment companies, and (7) the treatment accorded certain special types of companies, such as unit

[5] Tenth Report, p. 155.
[6] 15 U.S.C. § 80a.
[7] 15 U.S.C. § 80b.

investment trusts, periodic payment plans and face-amount certificate companies '.[8]

One of the most important of these functions is passing upon applications to have a particular transaction or series of transactions exempted from the provision of the Act which prohibits directors, officers, promoters and underwriters of investment companies and certain other persons from selling to or buying from an investment company. Some indication of the Commission's attitude toward such applications may be found in the following language in its report:

> 'The disposition of such applications requires a nice balance of conflicting factors which points up the need in such cases for the review of a specialised agency. On the one hand, in most of the situations resolved, there was the necessity of a speedy determination because the transactions depended a great deal on movements in the security markets. On the other hand, many of the issues involved in the determination of fairness were of a complicated nature, requiring the fullest use of financial experience and a delicate exercise of administrative judgment '.[9]

Some American investment companies have been organised as parts of systems which are almost as highly pyramided as some of the public utility holding company systems. Congress has not given the Commission power to simplify them. It has, however, given it some powers in cases in which simplification by voluntary corporate action is proposed. It has empowered the Commission in such cases to sue for an injunction against the consummation of a reorganisation plan of an investment company on grounds of gross unfairness, and has also authorised it under certain circumstances to make an advisory report to the security holders, as to the fairness of a reorganisation plan.

Although the first of these powers has thus far served solely as a threat, its effectiveness as such is indicated by the following quotation from an article of which a former chairman of the Commission and two members of its legal staff are co-authors: 'The existence of this provision has usually prompted proponents of plans to discuss them in advance with the Commission's staff and has resulted in modification or abandonment of particular plans upon an indication that the Commission might otherwise feel obliged to institute injunctive proceedings '.[1] In addition to obtaining modifications of plans

[8] Tenth Report, p. 164.
[9] Tenth Report, p. 168.
[1] 32 *Va. Law Rev.* 497, *supra*, note 1, at p. 545.

by this means, the Commission has made a number of reports to the security holders explaining the intricacies of some highly complex reorganisation plans.

Another of its activities has been the bringing of successful proceedings for receiverships of several investment companies. One of these companies had illegally suspended the redemption of its redeemable securities and had failed to furnish its shareholders with the reports required by the Act.[2] The managers of another had invested nearly a third of its funds in the purchase of a controlling interest in a race track at a price largely in excess of market quotations.[3]

The Investment Advisers Act requires persons who engage in the business of advising others as to the value of securities, with certain exceptions, to register with the Commission. The Commission has power to deny or revoke registrations for misconduct, but has no power to pass on the qualifications of investment advisers. It has complained that its power to revoke registrations is largely ineffectual because of the fact that the Act, unlike that under which it registers security brokers and dealers, gives it no power to inspect books and records.[4]

REORGANISATIONS UNDER THE BANKRUPTCY ACT

The power of Congress over the reorganisation of insolvent corporations is derived from its power 'to establish . . . uniform laws on the subject of bankruptcies throughout the United States'.[5] The law which it has enacted for the reorganisation of such companies is contained in Chapters X and XI of the Bankruptcy Act.[6] Reorganisation under these chapters is effected by means of proceedings in a federal court. The Securities and Exchange Commission has no regulatory function under these chapters, but, as the Commission has stated, Chapter X places two responsibilities upon it 'by providing (1) that, if requested by the judge, or on its own initiative if the judge approves, the Commission shall be a participant in proceedings thereunder in order to provide independent, expert assistance, and (2) that the judge shall, if the indebtedness of the debtor exceeds $3,000,000 and may,

[2] *S.E.C.* v. *Fiscal Fund Inc.*, 48 F. Supp. 712 (D. Del. 1943).
[3] *S.E.C.* v. *Aldred Investment Trust*, 151 F. 2d 254 (C.C.A. 1st, 1945), *cert. den.* 66 Sup. Ct. 486 (1946).
[4] Tenth Report, p. 182.
[5] U.S. Constitution, Art. 1, s. 8 (4).
[6] 11 U.S.C. Chapters X, XI.

if the indebtedness does not exceed that amount, submit to the Commission for advisory reports all plans of reorganisation which the judge deems worthy of consideration '.[7]

It is the usual practice of the Commission to enter its appearance in all reorganisations where there are securities in the hands of the public in an amount of $250,000 or more. By doing so it becomes vested with all the ordinary rights of a litigant except the right of appeal. In addition, its staff gives informal advice to reorganisation trustees and other parties in interest.

Chapter X, which is limited to corporations, provides for an elaborately safeguarded reorganisation procedure. Chapter XI permits a simpler, much less carefully safeguarded method, by which 'arrangements' may be made between debtors, individual and corporate, and their creditors. The Commission has successfully contended for a non-literal construction of the statute which prevents the safeguards provided for by Chapter X from being evaded by using Chapter XI in situations in which Chapter XI, although not expressly made inapplicable, is deemed unsuitable by the Commission. It is its belief, arrived at after a thorough study of reorganisation practices which it made at the request of Congress, that a somewhat paternalistic reorganisation procedure is desirable for all corporations whose securities are publicly held.[8] Chapter X, which provides for such procedure, was enacted largely for the purpose of giving effect to the Commission's views and the contention that it could be circumvented by instituting proceedings under Chapter XI was one with which the Commission was naturally unsympathetic.

Even where no statute with which the Commission is concerned is directly involved, the Commission frequently urges its views on the federal courts in matters affecting the rights of investors, by obtaining permission to file a brief as *amicus curiæ*. In *Guaranty Trust Co.* v. *York*,[9] a suit by a debenture holder against an indenture trustee, the Commission was unsuccessful in attempting to persuade the Supreme Court that federal courts of equity ought not to be bound by state statutes of limitation. Shortly thereafter, the Commission joined in a brief which successfully contended that the doctrine of the

[7] Tenth Report, p. 142.

[8] American corporation laws do not subdivide corporations into public and private companies but the companies for which the Commission deems Chapter XI suitable correspond roughly to British private companies.

[9] 326 U.S. 99 (1945).

York case should be limited to situations in which no federal statute was involved and the jurisdiction of the federal court was based solely on the citizenship of the litigants.[1]

IN CONCLUSION

After an existence of more than twelve years,[2] the Securities and Exchange Commission has firmly established itself as an important factor in the inter-relation between American business and American government. Under its ægis the information available to American investors has broadened in scope and has become more intelligible through the more general use of the best professional accounting techniques. Frauds in the purchase and sale of securities have been more vigorously probed than had hitherto been possible. The financial practices of two 'industries' in which abuses had been widespread—public utility holding companies and investment companies—have been effectively regulated. The drastic programme of integration and simplification which Congress has prescribed for public utility holding companies has been, and is being, carried out in a manner which is proving beneficial to their security holders. The security holders of financially embarrassed corporations, who are commonly a good deal bewildered with respect to the fairness and financial soundness of proposals for reorganisation, have found a disinterested adviser.

The Commission's powers have been conferred upon it by a series of piecemeal enactments. That such should be the case was almost inevitable under the American system which makes corporation law primarily a function of the separate states. The effect of that system is not only to limit the legal power of Congress to intervene, but also, in practice, to deter Congress from exercising such powers of intervention as it has until the need for regulation in a particular field and the inability or unwillingness of the states to supply that need has been thoroughly established.

The Commission has recently urged that certain gaps in its powers, including its inability to require the publication of financial reports by certain types of corporations and its powerlessness to examine the books of investment advisers,

[1] *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946).

[2] The Commission was established in June, 1934, at which time the administrative powers originally conferred upon the Federal Trade Commission by the Securities Act of 1933 were transferred to it.

ought to be filled. It is improbable that these suggestions will be heeded by Congress in the near future. Control of that body now is, and seems likely to remain for some time, in the hands of those who have little enthusiasm for regulatory agencies. Although they are unlikely to attempt any drastic curtailment of the Commission's powers, they are even less likely substantially to increase them.

E. MERRICK DODD.

ADMINISTRATIVE DISCRETION AND JUDICIAL CONTROL

I

THE MOTIVES OF ADMINISTRATIVE ACTS

A. V. Dicey, considering the merits of the French *droit administratif* which ' escape the attention, and do not receive the due appreciation of English constitutionalists ', referred to the decisions of the *Conseil d'Etat* ' in which individuals have obtained compensation for government action, which might possibly be considered of technical legality, but which involves in reality the illegitimate use of power conferred upon the government or some governmental body for one object, but in truth used for some end different from that contemplated by the law '.[1] The cases Dicey had in mind deal with the remedy on account of *détournement de pouvoir* [2] developed by the *Conseil d'Etat* to enable it to annul acts of an administrative authority issued for motives or purposes other than those for the fulfilment of which a discretionary power was granted. Typical are the instances of orders made for a political or fiscal purpose, while the power of the administration could only be used on police grounds.[3] Dicey's views seem to be open to criticism under both French and English law.

As to French law, without going into details, it has to be pointed out that Dicey attributes to the *Conseil d'Etat* powers which it does not possess. The action for *détournement de pouvoir* belongs to the *contentieux d'annulation*, as opposed to the *contentieux de pleine juridiction*. The *Conseil* may either reject the appeal or pronounce the annulment of the administrative act, if found illegal. But it cannot enter into further questions, such as award of compensation.

[1] *The Law of the Constitution* (9th ed., 1939), p. 398–401.

[2] Port, *Administrative Law* (1927), p. 315, translates it as ' misapplication of power ', but this is much too general. In the English legal language there is no appropriate expression to denote this particular shade of ' misapplication '.

[3] See, in general, Laferrière, *Traité de la juridiction administrative* (2nd ed., 1896), Vol II, pp. 548–560; Hauriou, *Précis de droit administratif* (9th ed., 1919), pp. 509–514; Alibert, *Le contrôle juridictionnel de l'administration* (1926), pp. 236–258; Appleton, *Traité élémentaire du contentieux administratif* (1927), pp. 621–632.

Recent comprehensive surveys of the French system for English readers are given by David, ' *Droit Administratif* in France ', in Wade, Appendix to Dicey, *op. cit.* (9th ed., 1939), pp. 495–504; Alibert, ' The French Conseil d'Etat ', in Mod.L.Rev., Vol. 3 (1940), pp. 257–271.

As to English law, it is wrong to lay stress on the *détournement de pouvoir* as a characteristic feature of the *droit administratif* without counterpart in this country.[4] Laferrière, too, in a classic work on French administrative justice, which first appeared at the same time as Dicey's, declares that neither English nor American Courts can exercise such an extensive control over the administration as is done in France, for they ' ne peuvent pas déclarer non avenu un acte de l'administration, que s'ils relèvent contre lui une infraction formelle à la loi, tandis que le Conseil d'Etat peut . . . atteindre des infractions plus détournées '.[5] Despite all the well-known limitations which make English administrative law so different from the French, the English Courts of law are, as far as the remedy for *détournement* is concerned, vested with powers similar to those held by the *Conseil d'Etat* or the administrative tribunals of other Continental countries.[6] The Courts have developed a series of rules—often based on principles having little in common with those used by French lawyers—which in some instances even seem to allow a more far-reaching control of the use of discretionary power.[7] At a time when the problem of the relations between the judiciary and the executive is so much discussed, it might not, perhaps, be without interest to consider the equivalent of *détournement de pouvoir* in this country.

II

JUDICIAL CONTROL OF MOTIVES

An inquiry into the motives of an administrative act must not overstep what lies within the discretionary power of the authorities and cannot be reviewed by the Courts. The principle governing the matter is expressed in *R.* v. *Vestry of*

[4] This appears to be done, for instance, by Wade and Phillips, *Constitutional Law* (2nd ed., 1935), p. 328, but not in the subsequent edition (3rd ed., 1946).

[5] *Op. cit.*, ii, pp. 558–559.

[6] See Keir and Lawson, *Cases in Constitutional Law* (2nd ed., 1933), pp. 138–139; Hart and Hart, *Law of Local Government and Administration* (1934), p. 381; Wade, Appendix, *cit.*, p. 523; Jennings, *The Law and the Constitution* (3rd ed., 1943), pp. 209, 217; Wade and Phillips, *op. cit.* (3rd ed., 1946), p. 271.

The statement by the authors of the Ministers' Powers Report (Cmd. 4060, 1932), who felt ' bound to confess that Continental critics are justified in their contention that under the rule of law in England the remedy of the subject against the Executive Government is less complete than the remedy of subject against subject ' (p. 112), ought to be understood with some qualification.

[7] It must not be overlooked that the English Courts have powers, such as that of issuing orders to administrative authorities, which are unknown in France and elsewhere.

St. Pancras,[8] where Lord Esher, M.R., held that 'if people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion', and that 'the legislature has entrusted the sole discretion to them, and . . . no mandamus could go to them to alter their decision. But they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one'.

The principle is repeated in equally wide terms by Lord Reading in *R.* v. *Brighton Corporation; ex p. Thomas Tilling, Ltd.*[9]: 'The Court ought to be very slow in interfering with the decisions of local authorities,[10] and this Court has always taken the view that, assuming the local authority has come to a decision upon the merits of the case, without taking into account or being influenced by matters outside their proper sphere of consideration, this Court should not interfere, notwithstanding that it might have arrived at a totally different conclusion. . . . But when the Court comes to the conclusion that the local authority has not properly exercised its discretion, because it has taken extraneous matters into account and allowed them to influence it, then it is the duty of this Court to intervene.'

This principle finds several applications, which may conveniently be divided into separate categories. Some of them are known to the law of contracts and some are not, but, in any case, the considerations on which they are based may be different. The following are those which can be drawn from the Courts' decisions:

(a) There may be an error of law.[11] In this case a mistaken

[8] (1890), 24 Q.B.D. 371, 375–376. Applied in *Sadler* v. *Sheffield Corporation*; *Dyson* v. *Sheffield Corporation*, [1924] 1 Ch. 483, 505: 'Lord Esher did not intend to confine the general proposition stated by him to the particular facts of that case'. See also *R.* v. *Board of Education*, [1910] 2 K.B. 165.

[9] (1916), 85 L.J.K.B. 1552, 1555. See also *Ah Sing* v. *Minister of Interior*; *Tuling* v. *Minister of Interior* (1919), Transvaal Provincial Division, [S.A.] 338; Frankfurter and Davison, *Cases and Other Materials on Administrative Law* (1932), p. 1039.

[10] In this sense *London County Council* v. *Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445, 452.

[11] In France this is not *détournement* but *violation de la loi*. The American conception seems to be very wide, for when, for instance, a rate-fixing body 'has omitted to take into consideration some element or factor which the Court thinks ought to have been included, error of law is promptly held to have been committed and the power to review is exercised': Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1929), p. 55.

interpretation of the law leads to wrong considerations being taken into account.[12] In *R.* v. *Boteler*[13] Cockburn, C.J., said: 'I do not intend in the slightest degree to encroach upon the doctrine that, when magistrates have a discretionary power to decide whether they will do an act or not, this Court will not order them to do it when they have exercised their discretion upon the merits of the matter. But it is clear, upon the facts of the present case, that they have not exercised that discretion which in law they would have been justified in exercising. This extra-parochial place, having been made part of a Union [by a Poor Law Board], became liable by law to contribute its share to the general expenses of the Union; and the magistrates, having that fact established before them, ought to have issued their warrant. It is equally clear that the reason why they did not do so was because they were invited to exercise their discretion on a matter which was not within it. They proceeded upon the ground that the annexation of this extra-parochial place to the Union was unjust, in other words, that the operation of the Act of Parliament under which that was effected was unjust. . . . That is not a tenable ground on which this Court can allow magistrates to decline to exercise their discretion according to the law.' Similarly, it was held in *R.* v. *Mayor and Corporation of Newcastle-on-Tyne*,[14] that a local authority was wrong in disapproving of the construction of a new building on the ground that it would be unsuitable to the locality and would tend to depreciate the character of the neighbouring property, when the law did not give it an absolute discretionary power of approval or disapproval and it was bound to approve. In *R.* v. *Ormesby Local Board*[15] the local board was held to have misconstrued the section on which it purported to act, and there was therefore no exercise of discretion. *R.* v. *Board of Education*[16]: 'The Board, by acting on a wrong construction of the Act, have not exercised the real discretion given to them thereby; a discretion to say whether the sums provided are fit and proper on the assumption that the Act allows the authority to prefer provided to non-provided schools as such, is entirely different from a discretion to say whether they are fit and proper when such preference is unlawful.'

(b) There seems to be an error of fact when a public body is prompted by a mistaken belief in the existence of some

[12] See Keir and Lawson, *op. cit.*, pp. 137–138.
[13] (1864), 4 B. & S. 959, 964; Keir and Lawson, *op. cit.*, p. 198.
[14] (1889), 60 L.T. 963.
[15] (1894), 43 W.R. 96.
[16] [1910] 2 K. B. 165, 179, affirmed in *Board of Education* v. *Rice*, [1911] A.C. 179.

circumstances of fact.[17] According to the Education Act, 1902,[18] s. 7 (1) (c), the consent of the local education authority is required for the dismissal of a teacher in a non-provided public elementary school, 'unless the dismissal be on grounds connected with the giving of religious instruction in the school'. It was held in *Smith* v. *Macnally*[19] that in order to render such a dismissal a valid one 'it is necessary not merely that managers shall in their own mind consider that there is a ground for dismissal connected with the giving of religious instruction, but there must, in fact, be such a ground'.

(c) The administrative authority may operate in bad faith or from corrupt motives, though its act is, 'on the face of it, regular and within its power'. In this case, 'no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative': *Short* v. *Poole Corporation*.[20] The Earl of Halsbury, L.C., said in *Westminster Corporation* v. *London and North Western Ry.*[21]: 'If the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the Legislature for one purpose could not be used for another.' And Lord Macnaghten: 'It is not enough to shew that the corporation contemplated that the public might use the subway as a means of crossing the street. . . . In order to make out a case of bad faith it must be shewn that the corporation constructed this subway as a means of crossing the street under the colour and pretence of providing public conveniences which were not really wanted at that particular place.'[22] A public body, entrusted with powers and duties for a public purpose, will be given credit by the Court as being the best judges of what they want for that purpose, 'unless the other side shew a manifest and palpable case of wilfulness in their desire to impede without doing any good to themselves': *per* Lord Hatherley, L.C., in *Att.-Gen.* v. *Great Eastern Ry.*[23]

(d) The public authority must not pursue a 'collateral'

[17] For the *Conseil d'Etat* this is not *détournement*, but part of the French doctrine holds the opposite view. The results, however, are the same.
[18] 2 Edw. 7, c. 42.
[19] [1912] 1 Ch. 816, 825.
[20] [1926] 1 Ch. 66, 90–91.
[21] [1905] A.C. 426, 428.
[22] At p. 432.
[23] (1871), L.R. 6 Ch. 572, 578.

motive, which may even be legal in itself, but is not the one for the attainment of which its powers were granted.[24]

In *Marshall* v. *Blackpool Corporation* [25] it was held that a local authority, when dealing with an application for permission to construct a communication to enable vehicles to go in and out of premises, must not use the safety of the public as a reason for prohibiting all ingress and egress. Slesser, L.J., added: 'They may have regard to matters affecting the safety of the public and the convenience of traffic, but should not have regard to their proposed Town Planning Scheme or any contemplated use of the portion of the borough . . . for residential purposes only.' [26]

The compulsory purchase of land supplies some interesting examples. In *Galloway* v. *Mayor and Commonalty of London* [27] Lord Cranworth, L.C., said: 'When persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is for any purposes except those for which the Legislature has invested them with extraordinary powers. . . . It has become a well-settled head of equity, that any company authorised by the Legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing.' In *Municipal Council of Sydney* v. *Campbell* [28] the appellants had statutory powers to acquire compulsorily land for the purpose of making or extending streets and carrying out improvements in or remodelling any portion of the city. The Privy Council held that 'at the time of the passing of the resolution . . . the council conceived it to be within its powers to resume lands not needed for the extension itself, but solely for the purpose of appropriating the betterments arising from the extension. A body . . . authorised to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere'.[29] The test is, however, difficult, as

[24] This is the classical instance of *détournement*.
[25] [1933] 2 K.B. 334.
[26] At pp. 353–354.
[27] (1866), L.R. 1 H.L. 34, 43; Keir and Lawson, *op. cit.*, p. 139.
[28] [1925] A.C. 338.
[29] At p. 343.

' the party impeaching those proceedings must, of course, prove that the council, though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object '. The latter is a question of fact and it is not always easy for the party claiming the nullity to prove the motives behind the administrative action, especially if the authority does not state them or they do not otherwise result from the case. In *The King* v. *Minister of Health; ex p. Davis*,[30] an improvement scheme, purporting to be made under the provisions of the Housing Act, 1925,[31] after providing for the acquisition and clearing of an unhealthy area, empowered the local authority to sell, lease or otherwise dispose of, as they thought fit, the cleared area or to appropriate or use it for any purpose approved by the Minister of Health. The scheme was held *ultra vires* because, as Lord Hewart, C.J., said, ' under the name, and the agreeable name, of an improvement scheme, this particular council is minded to acquire a slice of very valuable land in the heart of the city of Derby, not for any purpose of rearrangement or reconstruction, but for the purpose, if and when the local authority thinks fit, of resale, and, of course, of resale at the highest obtainable price '.[32]

A second group of cases deals with licensing of cinema performances. It was laid down in *Theatre de Luxe (Halifax), Ltd.* v. *Gledhill*,[33] Atkin, J., dissenting, that, according to the Cinematograph Act, 1909,[34] s. 2 (1), the power of the licensing authority to impose conditions is limited to the use of the premises for the giving of cinematograph exhibitions. Conditions based on the public interest, such as those having regard for the health and welfare of young children, were held

[30] [1929] 1 K.B. 619.
[31] 15 Geo. 5, c. 14, Part II.
[32] At p. 624. See also Allen, *Law and Orders* (1945), pp. 134–136. Another instance may be found in *Denman* v. *Westminster Corporation*, [1906] 1 Ch. 464, 476: ' The local authority are entrusted with statutory powers, to be used *bona fide* for the statutory purpose, and for none other '.
The case is different when an authority is expressly given power to secure the clearance of an area either by ordering the demolition of the buildings or by purchasing the land, notwithstanding that it may do injury to private individuals: *Robin & Son, Ltd.* v. *Minister of Health*, [1939] 1 K.B. 520, 537, *per* MacKinnon, L.J.: ' Obviously, in either case, the appellants, who want to extend their existing premises, must be the most eager purchasers. In such circumstances the possibility of using the provisions of the Act for the indirect purpose of making money out of the appellants is apparent. I do not for one moment assume that any such purpose is contemplated by the corporation. Indeed, I assume that so discreditable a manœuvre cannot be their intention. I only say it is a possible result under the provisions of this Act and one which I have to characterize as remarkable '.
[33] [1915] 2 K.B. 49.
[34] 9 Edw. 7, c. 30.

to be *ultra vires*, however necessary they might be. This decision ought to be construed strictly. In *Harman* v. *Butts and Others*[35] Atkinson, J., stated: 'Bearing in mind the expressions of judicial opinion that the decision in the *Halifax Case* only applies where the facts are precisely the same, I feel that I am at liberty to hold that it has no bearing on an application under a different Act, relating only to Sundays, and that the discretion of the licensing authority is not subject to the limitations imposed in that case, but is unlimited save that it must be exercised in a reasonable way.' In *R.* v. *London County Council; ex p. London and Provincial Electric Theatres, Ltd.*,[36] it was held, and approved by the Court of Appeal, that the council could have regard to the public interest; *per* Lord Reading, L.J.: 'We should only order the mandamus to issue if we came to the conclusion that the council, by taking into consideration the enemy character of the constitution of the company, had allowed their minds to be influenced by extraneous considerations. The council in these matters are the guardians of the public interest and welfare. . . . I cannot hold that such considerations are extraneous or extra-judicial.'

The dismissal of teachers provides another instance of faulty motives. The local authority may dismiss a teacher 'on educational grounds', according to section 7 (1) (a) of the Education Act, 1902. Russell, J., held in *Hanson* v. *Radcliffe Urban District Council*[37] that 'the mere desire to economise does not . . . entitle the local education authority to terminate the employment of a teacher, alleging that to be an educational ground', and this was confirmed by the Court of Appeal.

The act is *ultra vires* even if its motives are 'alien and irrelevant'. This was decided by Warrington, L.J., in the case of the dismissal of a married woman teacher, appointed at pleasure, from a provided school: *Short* v. *Poole Corporation*[38]: 'It may also be possible that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any

[35] [1944] 1 K.B. 491, 499.
[36] [1915] 2 K.B. 466, 475–476.
[37] [1922] 2 Ch. 490, 500, approving and following *Martin* v. *Eccles Corporation*, [1919] 1 Ch. 387. See also *Blanchard* v. *Dunlop*, [1917] 1 Ch. 165.
[38] [1926] 1 Ch. 66, 91. This defect and some of those previously mentioned 'are merely intended when properly understood as examples of matters which if proved to exist might establish the *ultra vires* character of the act in question'.

act which would be held *ultra vires* under this head, though performed *bona fide*. To look for an example germane to the present case, I suppose that if the defendants were to dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason, the Court would declare the attempted dismissal to be void.'

(e) The grounds of an act must be reasonable.[39] The point is as delicate here as in other provinces of the law. The reasonable exercise of a power is defined as follows by Lord Wrenbury, in *Roberts* v. *Hopwood*[40]: 'A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably'.

It is generally assumed that the Courts ought to be 'slow' to condemn the administration on the grounds of unreasonableness, as on other grounds previously mentioned. When representative bodies are concerned, application is usually made[41] of the principles stated by Lord Russell in *Kruse* v. *Johnson*[42] with regard to by-laws. They are that an elected body, vested by Parliament with wide powers, may be trusted to understand the requirements of the people it represents better than judges. Reasonableness should not be taken in the narrow sense of the word. The qualification, the exception, the limit, which some particular judges may think prudent or necessary or convenient, do not help in laying down a principle or definite standard by which reasonableness or unreasonableness may be tested. A wide margin should be allowed for error in judgment, not amounting to misconduct, or for deliberate policy, not being illegal. The question of unreasonableness has to be regarded in another sense. If the acts of the administration were, for instance, 'found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad

[39] That unreasonableness is due to taking into account improper considerations is shown by Lord Atkinson when he condemns as unreasonable the remuneration of personnel by a council who 'allowed themselves to be guided in preference by some eccentric principles of socialist philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour', which should not be taken into consideration at all: *Roberts* v. *Hopwood*, [1925] A.C. 578, 594, 600.

[40] [1925] A.C. 578, 613, followed in *Att.-Gen.* v. *Tynemouth Union*, [1930] 1 Ch. 616, 625.

[41] See, for instance, *R.* v. *Roberts; ex p. Scurr and Others*, [1924] 2 K.B. 695, 719, 721, 726–727, as well as *Roberts* v. *Hopwood*, [1925] A.C. 578, 588.

[42] [1898] 2 Q.B. 91, 99.

faith;[43] if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say: "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*."'[44]

The principle is not limited to local elected bodies. Dealing with regulations issued by the Minister of Transport in 1934 and 1941, alleged to be unreasonable, and approving *Kruse* v. *Johnson*, Scott, L.J., said in *Sparks* v. *Edward Ash, Ltd.*[45]: 'If it is the duty of the Courts to recognise and trust the discretion of local authorities, much more must it be so in the case of a minister directly responsible to Parliament and entrusted by the constitution with the function of administering the department to which the relevant field of national activity is remitted. Over and above these grounds for trusting to that minister's constitutional discretion is the further consideration that these regulations have to be laid on the table of both Houses . . . and can be annulled in the usual way. For the above reasons, this Court has, in my opinion, no power to declare these two regulations invalid for unreasonableness.'

In respect of war-time legislation the Courts have often denied they had power to control unreasonableness,[46] a

[43] While *bona fides* seems here to be an aspect of reasonableness, Lord Macnaghten seems to hold that reasonableness is an aspect of *bona fides*: 'It is well settled that a public body invested with s atutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first': *Westminster Corporation* v. *London and North Western Ry.*, [1905] A.C. 426, 430. The two aspects are separated by Scrutton, L.J.: 'Good faith is not, in my view, sufficient by itself; some of the most honest people are the most unreasonable; and some excesses may be sincerely believed in, but yet quite beyond the limits of reasonableness': *R.* v. *Roberts; ex p. Scurr and Others*, [1924] 2 K.B. 695, 719. This shows how closely knit are the various categories of defects of the motives. Lord Sumner, in *Roberts* v. *Hopwood*, [1925] A.C. 578, 601, 603–604, solves the apparent riddle by mentioning the different definitions of good faith as meaning not only honesty but that a council 'are giving their minds to the comprehension and their will to the discharge of their duty towards the public'.

[44] This criterion is similar to the one described by Dickinson, *op. cit.*, pp. 167–168. The Courts 'are merely to prevent such abuse of discretion as would be constituted by a decision which reasonable men could not have made on the same evidence. . . . Where the only ground which a Court can give for its difference from the administrative body is limited to mere difference of opinion as to some matter or matters peculiar to the case, or some difference in inference from those matters, then the Court should not disturb the opinion or inference of the fact-finding body unless the latter is plainly beyond the bounds of reason; for the difference is one of discretion, or "fact"'. See also the decision of the Supreme Court of the United States in *Yick Wo* v. *Hopkins, Sheriff; Woo Lee* v. *Hopkins, Sheriff*, 1886, 118 U.S. 356; 6 Sup.Ct. 1064; Frankfurter and Davison, *op. cit.*, p. 1130.

[45] [1943] 1 K.B. 223, 229–230.

[46] See, for instance, *Minister of Agriculture and Fisheries* v. *Price*, [1941] 2 K.B. 116; *R.* v. *Comptroller-General of Patents; ex p. Bayer Products, Ltd.*, [1941]

phenomenon contrasting with the tendency of Courts in general to enlarge their own jurisdiction. The Courts refuse to investigate the grounds on which the executive formed its belief and the expediency of its acts for the purposes for which the emergency powers were conferred, recognising a complete, and not quasi-judicial, discretion of the executive. However these decisions, which mark 'the conflict between the "objective" and the "subjective" theories',[47] may be criticised, they seem to be based on a strict interpretation of the words of the Defence Regulations and the exceptional character of the powers granted to the executive. An application of the principle does not appear to be possible where the terms of the text are different and do not lend themselves to such an interpretation, and there are no exceptional powers, for in case of doubt the liberty of the individual must prevail.

III

PLURALITY OF MOTIVES

Good motives may be found together with the faulty. Should there also be *bona fide* educational grounds for the dismissal of a teacher, these would be, according to P. O. Lawrence, J., in *Sadler* v. *Sheffield Corporation*; *Dyson* v. *Sheffield Corporation*,[48] 'mixed grounds, compounded as to part of financial grounds and as to the rest of educational grounds. Mixed financial and educational grounds, in my judgment, are not educational grounds within the meaning of sub-section (2) (a) [of the Education Act, 1921,[49] s. 29]. In my opinion it would not be right (even if it were possible) to attempt to resolve the mixed grounds into their component parts, and then to cast away the financial grounds, so as to leave the educational grounds as the undiluted and sole grounds for the dismissal. It seems to me . . . that here the financial grounds and the educational grounds were inextricably mixed and must stand or fall together. Another way of putting the same point is that sub-section (2) (a) confers upon the local education authority a discretionary power to require the dismissal of a teacher

1 K.B. 306; *Liversidge* v. *Anderson*, [1942] A.C. 206; *Greene* v. *Secretary of State for Home Affairs*, [1942] A.C. 284; *Horton* v. *Owen*, [1943] 1 K.B. 111; *Point of Ayr Colliery, Ltd.* v. *Lloyd George*, [1943] 2 All E.R. 546; *Carltona, Ltd.* v. *Commissioners of Works*, [1943] 2 All E.R. 560.

47 Allen, *op. cit.*, p. 243.

48 [1924] 1 Ch. 483, 504–505.

49 11 & 12 Geo. 5, c. 51.

in a non-provided school on educational grounds only, and, if the authority in exercising the discretionary power takes other grounds into account, the power is not well exercised '.

There is no contradiction between this case and other cases when the motives are not ' inextricably mixed '. In *The King* v. *Brighton Corporation; ex p. Shoosmith*,[50] a tarmac surface was put on a road so as to have it ready in time to be available for car races. Although this was the occasion for the work being done, it is impossible to say that ' the corporation, under the colour or pretence of making this road more convenient for those who live in or near Brighton, did this road-making really for the purpose of obliging the Automobile Club ', when there was a clear need for the road's improvement. In *Re Decision of Walker*[51] it is the amount paid in wages by a local authority that counts, according to Goddard, L.J., and not the motive which led to that amount being paid. ' How or why they arrive at that particular figure is, in my opinion, irrelevant. If the result is a reasonable sum, that is enough to justify the payment '.[52] And for du Parcq, L.J., expenditure is not always contrary to the law ' whenever the local authority's reasons for the expenditure are ill-advised, stupid or even (it may be) dishonest '.[53] Defective motives, in other words, only come into consideration in so far as they reveal the *ultra vires* character of the act.

Vaughan Williams, L.J., in the *Brighton Case* distinguishes between ' motive ' and ' purpose '.[54] It does not matter if the motive is an extraneous one, provided that the purpose is proper. It is difficult to follow this conception. Motive and purpose of an administrative action cannot be separated, for they are to be understood as one and the same thing seen from a different angle. The motives are the reasons which move the public authority with relation to the ends of its action. There may be more than one motive and more than one purpose of the administrative action. But each motive has to be considered as a whole with the purpose to which it corresponds. The wrong motives and purposes do not invalidate the act when the legal ones exist and can be isolated and are not affected. It is not so much the way in which the

[50] (1907), 96 L.T. 762, 764. See also *Westminster Corporation* v. *London and North Western Ry.*, [1905] A.C. 426, 432.
[51] [1944] 1 K.B. 644.
[52] At p. 649.
[53] At p. 650.
[54] (1907), 96 L.T. 762, 763. See also Wade and Phillips, *op. cit.* (3rd ed., 1946), p. 271.

administrative decision has been reached that matters, as the result, which has to fulfil the purpose set by the law. The principle laid down in these cases is an application of the rule that *utile per inutile non vitiatur.*

IV

LEGAL LIMITS TO ADMINISTRATIVE DISCRETION

The judgment on the motives or purposes operates along the border-line between what is legal and what is merely discretionary. It is indeed contended in France that the admission of *détournement de pouvoir*, entailing a judicial review of motives and purposes, eliminates the possibility of a discretion [55] or that it vests the *Conseil d'Etat* with the power of a judge on 'administrative morality'.[56] From a general point of view, it is possible to say that the public administration is granted a 'blanket', a sphere where it may freely exercise its activity and consider each case on its merits. Such a power, however, is not without limits set by the law to prevent it becoming arbitrary. Any activity trespassing them is therefore illegal. One of the conditions binding administrative action is that it should correspond to some general or special purpose explicitly or implicitly determined. When the action is inspired by different motives or grounds, when it is directed at different aims or purposes, it is invalid because this shows that the discretion is not properly exercised. The Courts do not substitute their discretion for that of the administrative authority. They simply rely on some external elements warranting the conclusion that the discretion was not based on correct grounds and was therefore exercised in the wrong direction. One could only properly speak of 'administrative morality' with regard to the exercise of discretionary power untrammelled by judicial checks. There can be no doubt that this is the solution of the problem according to English law. Phillimore, L.J., in *Mitchell* v. *East Sussex County Council*,[57] dealing with the question of 'educational grounds', already previously considered, in an action for declaration that a notice was invalid and inoperative and for relief by injunction, stated: 'Although this matter comes from the Chancery Division, and although the remedy sought is *prima facie* an equitable remedy, it is really a pure matter of dry law which

[55] Duguit, *Traité de droit constitutionnel* (Vol. II, 1923), p. 297.
[56] Cp. Welter, *Le contrôle juridictionnel de la moralité administrative* (1929), pp. 73 ff., 325 ff.
[57] (1914), 109 L.T. 778, 779–780.

one can determine and should determine without having regard to any other considerations, hardship, or whether or not the tribunal or authority which has power to decide the matter has decided it, in our opinion, rightly or wrongly. The matter can be determined by this Court [Court of Appeal]. It is possible it might also be determined by the Board of Education. But it can be determined by this Court, not the quantum of educational grounds, because that is not a matter to be determined by the Court.[58] Whether or not there are educational grounds is a matter which this Court can determine '.[59] Lord Sterndale, M.R., held in a similar case, *Hanson* v. *Radcliffe Urban District Council*[60]: 'All I have to say is, whether what was ordered to be done by the local education authority was legal or not'. It is significant that section 1 (1) of the Supplies and Services (Transitional Powers) Act, 1945[61] had to be devised, to make it possible for a Defence Regulation to 'have effect for the purpose of . . . maintaining, controlling and regulating supplies and services' in the period of transition from war to peace, 'whether or not it is for the time being necessary or expedient for the purposes specified in subsection (1) of section one of the Emergency Powers (Defence) Act, 1939'.

The cases previously mentioned show that the acts of an administrative authority are treated differently to those of private individuals in respect of their invalidity. The reason is given by Warrington, L.J., in *Short* v. *Poole Corporation*[62]: 'Being established by statute for certain limited purposes, no act purporting to be that of the public body can have any operation as such, if the individuals purporting to exercise the functions of the public body have, in performing the act in question, transcended the limits of the authority conferred upon it'. The principle is applied in *Fennel* v. *East Ham Corporation*,[63] in a case of notice to terminate an engagement given by a local authority on the basis of a contract. Lawrence, J., said: 'Under ordinary circumstances the

[58] 'Assuming the things done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. When the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion', *per* the Earl of Halsbury, L.C., in *Westminster Corporation* v. *London and North Western Ry.*, [1905] A.C. 426, 427.

[59] See also *Smith* v. *Macnally*, [1912] 1 Ch. 816, for grounds connected with the giving of religious instruction.

[60] [1922] 2 Ch. 490, 504.

[61] 9 Geo. 6, c. 10.

[62] [1926] 1 Ch. 66, 90.

[63] [1926] 1 Ch. 641, 651–652.

Court would never go into the motive of either party for exercising any of the contractual rights, as no action would lie, however corrupt such motive might have been. Had the plaintiffs given written notices to the Council to terminate their engagements, the Council could not have treated such notices as inoperative because the plaintiffs had given them corruptly or *mala fide*. *Short's Case*, however, is an authority for the proposition that, if one of the contracting parties is a statutory body and, therefore, can only properly exercise its powers for the purposes for which it is created, the other party to the contract has a right to question the motives which actuated the statutory body in exercising its contractual rights; and on proof that such motives were corrupt or *mala fide* or otherwise alien to the objects for which it was created, to obtain a declaration that such purported exercise is null and void '.

The case of invalidity for unreasonableness is even more delicate. A comparison between the English and the French system is not unfavourable to the former, as is often alleged. It must, however, be borne in mind that their legal categories do not always coincide. In France no control could openly be admitted over the reasonableness of an act, this being a matter pertaining to the *opportunité* into which the *Conseil* is forbidden to enter. No such obstacle hampers the work of the English Courts. But it would be misleading to deduce from this, *sic et simpliciter*, that the English Courts exercise a control over the administration which (i) goes beyond the legality of its actions, and (ii) penetrates much deeper than that of the French *Conseil*.[64] As to the first point, whatever may be the case in France, it is not unusual in the law of this country for the judges to decide on the issue of reasonableness, even in private matters.[65] This applies to the actions of the administrative authorities, as typified by the decision of Lord Atkinson in *Roberts* v. *Hopwood*,[66] that the duty of a local body to act ' in a fairly businesslike manner with reasonable care ' is ' a legal duty as well as a moral one, and acts done in flagrant violation of it should, in my view, be properly held to have been done " contrary to the law " within the meaning

[64] This is the opinion of Bonnard, *Le contrôle juridictionnel de l'administration* (1934), pp. 127–131. In cases of unreasonableness the English Court ' dépasse ainsi un peu le strict point de vue de la légalité pour pénétrer sur celui de l'opportunité ', acting more like a hierarchical superior than like a Court of law.

[65] See Robson, *Justice and Administrative Law* (1928), p. 235.

[66] [1925] A.C. 578, 595–596. See also, *e.g.*, the Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), s. 290 (3) (*c*).

of section 247 (7) of the Public Health Act of 1875'. It is not, of course, always easy to fix the boundary between what can be invalidated as unreasonable, and what cannot as belonging to administrative discretion. One would then be tempted to say that matters which could be free in France within the limits of discretion might be legally bound in England. This, however, is not always so, as the consideration of the second point set out above will show. The *Conseil* may sometimes arrive at the same results as the English Courts, though following a different and less direct course. Instead of judging whether an act is reasonable or not the *Conseil*, in its continuous endeavour to widen its jurisdiction and its control over the administration, adheres to the strict principle of the *détournement* and adapts it to make further inroads. Some recent decisions demonstrate that, when neither the law nor any other document determines the grounds which should lead the administration in the exercise of its powers, the *Conseil* feels it to be its duty to inquire what are these grounds, despite the legislative omission.[67] This step, which is qualified as 'explosif', means that the *Conseil*, following its 'politique jurisprudentielle', takes upon itself the appreciation of the *opportunité* when the interests of the citizens are affected by the administrative action, to avoid the rule of the 'bon plaisir administratif'.[68] Despite the many differences, the two systems are proceeding along parallel paths.

G. E. Treves.

[67] See the decisions of the *Conseil d'Etat*, July 9, 1943 (case: *Tabouret et Laroche*), and July 28, 1944 (case: *Dame Constantin*), *D.H.*, 1945, *J.* 163.

[68] See Morange, 'Le contrôle de la légalité et de l'opportunité des décisions préfectorales en matière d'opérations immobilières', *ibid.*, pp. 164–166.

JUSTICE AND THE ARMY

RECENT events, occurring in the Far East and echoing in Westminster, have once again drawn public attention to the administration of justice in the Army. The demand that those convicted should have a right of appeal to the High Court is based not primarily on the ground that every subject should be so entitled as part of his democratic heritage but that the administration of justice is incompetently handled by unqualified officials and that a legal check is therefore necessary. The demand would find little support if substantial justice were thought to result from courts martial and if it were agreed that the trials were conducted in a proper judicial spirit.

To what extent then has a member of the Army just cause for complaint?

On May 14, 1946, a 'mutiny' occurred at Muar Camp, Malaya, and as a result of the court martial held in August 243 men were convicted and sentenced to two years' imprisonment with hard labour and to be discharged with ignominy.[1] On October 10, 1946, the Secretary of State for War informed the House of Commons that acting on the advice of the Judge Advocate General he had quashed these convictions,[2] and on October 15 gave his reasons as follows: first, evidence in the majority of cases was allowed to be taken from spokesmen of groups, contrary to the Rules of Evidence; second, the Judge Advocate at the trial misdirected the court in law as to the bearing of the evidence in its application to each individual case; and third, he failed to deal with the case of each accused individually on its own merits.[3] These irregularities had apparently passed the scrutiny of the J. A. G.'s department in India. Public apprehension was considerable for if investigation resulted in this state of affairs being revealed, might there not in many other cases unlit by the glare of publicity have been similar irregularities and should not the whole system be investigated? It was true that a Committee sitting in 1938 on courts martial had reported[4]: 'We cannot sufficiently emphasise the importance of the result that our studied

[1] *Weekly Hansard*, No. 27, cols. 34–42.
[2] Ditto, No. 27, cols. 368–75.
[3] Ditto, No. 28, cols. 800–4.
[4] Report of the Army and Air Force Courts Martial Committee, 1938 (Cmd. 6200). All footnote references to paragraphs are to this report unless otherwise stated.

search for cases of injustice covering a period of twenty years, and from all over the world, has discovered not a single one.' [5] Nevertheless here apparently was such a one. The result was that on November 5, 1946, the Secretary of State for War announced that another Committee under the chairmanship of the Hon. Mr. Justice Lewis was being set up and that the members would be four M.P.s (including two K.C.s and one barrister), the Director of Public Prosecutions and two senior officers, one from the Army and one from the R.A.F.[6] The main terms of reference are: 'To bring under review, in the light of the experience gained in the late war and of the composition of the Army and the R.A.F., the recommendations of the Army and Air Force Courts Martial Committee, 1938 (Cmd. 6200), with special reference to the question whether it is desirable to provide any and if so what form of appeal from the findings or sentences of courts martial'.

Courts martial are seldom widely publicised and those which the Press chooses to emphasise are sensational and exceptional, but the number of trials on minor charges is very large. A permanent president of courts martial operating within an area the size of the county of Surrey may in wartime hear over twenty cases a week. The great majority of these are cases of desertion, the essence of which offence is an intention on the part of the absentee, when he absents himself, never to return. Very often a soldier who absents himself has no clear idea when, if ever, he intends to return; his mind does not advert to the question at that time. He is absent for a few months and then either surrenders or is arrested. We will assume that he is handed over by the military or civil police to a large static holding battalion since such a unit, generally, has the most efficient administration for dealing with offenders. Within a day or so of his return he is taken before his commanding officer, who remands him in custody while a Summary of Evidence is taken. The unit may boast a Courts Martial Officer responsible for the preparation and presentation of all cases. The Summary of Evidence taken by the C.M.O. is attended by the accused, who hears the evidence, may question witnesses and may make a statement. In desertion cases the evidence usually consists of two documents: first, a declaration by the Court of Inquiry (held in the fourth week after the original absence) that the accused absented himself without leave on a certain date, and second, an arrest certificate

[5] Para. 9.
[6] *Weekly Hansard*, No. 31, cols. 1219–22.

forwarded by the police or other authority who took the accused into custody or to whom he surrendered. At the conclusion of the Summary of Evidence the accused is asked if he requires a particular defending officer, or a defending officer who will be detailed, or whether he wishes to defend himself. If the accused has been absent for a few months, or if he has been returned to a unit other than that from which he absented himself, he will most probably not know any of the officers. He may if he wishes ask for a defending officer from another unit, but in all cases the C.O. of the officer asked for may decide that that officer is ' not available '. The commonest reason why an officer is ' not available ' is that he, being perhaps a company commander or an adjutant, is very busy and cannot be spared. For many reasons, therefore, it is true to say that in the great majority of cases the accused receives for his defence an officer, below the rank of major, whom he has never seen before. If the Summary of Evidence against the accused appears to be satisfactory, application is made to higher authority for the convening of a court martial. Before the convening, the Summary of Evidence in more serious cases such as theft is sent to the Military Department of the Judge Advocate General's office, who ' vet ' the case for the prosecution and, if they consider that more evidence is necessary to substantiate the charge, recommend that a further Summary of Evidence be taken on the additional points. The defending officer talks with the accused, arranges for witnesses to be called and prepares the case.

The court martial having been convened, the trial starts. Usually the court consists of three officers: the president (a major with long service), the senior member (a captain), and the junior member (a lieutenant). The court having been sworn, the accused pleads. If he pleads ' Guilty ', the Summary of Evidence is read and the sentence determined. If he pleads ' Not Guilty ', the two documents are produced by a witness for the prosecution (often the prosecuting officer himself) and the president then explains to the accused how he may defend himself in one of three ways: either he may make a statement on oath, on which he may be cross-examined or questioned, or he may make a statement not on oath on which he can neither be cross-examined nor questioned, or he may say nothing and leave his defending officer to speak on his behalf. One of these courses having been followed, and the case for the defence concluded, the final speeches are made and the court is closed.

It is interesting to note the way in which these desertion

cases are decided. On a charge of desertion the court has power to find the accused not guilty of desertion but guilty of absence without leave, and in most desertion cases this verdict should be the aim of the defence. In deciding of which offence the accused is to be found guilty the court looks at three things: first, the length of the absence—it is not common for a soldier to be charged with desertion if he has been absent only a week or two unless he deserted to avoid some particular military duty, such as an overseas draft; second, any special circumstances, such as trouble in his home, which will be evidence of his intention to return; and third, whether he surrendered or was arrested. We have seen that the evidence against the accused proves only the fact and duration of his absence and has no word to say on the essence of the charge, his intention. But it will not avail the defence to plead that it has no case to answer; findings and sentences on charges of desertion can be fairly accurately forecast if the accused elects not to make a sworn statement. If he has been absent over a month or six weeks and makes no sworn statement, he will be found guilty of desertion, although no evidence is proved by the prosecution as to intention, and sentenced to rigorous imprisonment for as many days as he was absent plus about a third of that period. If he makes a sworn statement, the court then has evidence of his intention elicited in examination, cross-examination and questionings by the court. In the military eyes of the court there can very rarely be justification for a long absence since, if there was trouble at the accused's home, he should have settled it and returned. This is reasonable until we recall that if a soldier at the time when he absented himself did not intend never to return, then, strictly, whatever the length of his absence, he cannot be guilty of desertion. A finding of desertion is far more serious than a finding of absence without leave, and in practice the court looks at the length of absence. If the period is a matter of weeks only and the accused surrendered, the court will find him guilty of absence only. If the period runs into months, the accused will be found guilty of desertion whatever his intention and even if he surrendered. When the court reopens after the finding, if the accused has been found ' Not Guilty ', this is announced; if he has been found ' Guilty ', this verdict, since it is subject to confirmation by higher authority, is not announced. The accused's record of service is then produced, the defending officer submits a plea in mitigation of sentence and the court is closed for consideration of the sentence.

There are, then, apart from the accused, five principal actors in the drama, the prosecuting and defending officers and the three members of the court. The extent and nature of the judicial element in courts martial depend on their conduct of the case. We must next consider their roles, their playing, and to what extent individuals are habitually miscast.

The prosecuting officer is at best an officer employed full time on all questions relating to law in the unit. He is generally Courts Martial Officer and Legal Advice Officer. Very frequently, however, in units not exceeding the size of a battalion, this ideal is not realised. Shortage of officers is the deciding factor, and often Summaries of Evidence and the preparation of cases are the responsibility of companies and the work is passed to an officer so young in service that his protests of inadequacy are scarcely audible. Since the accused at the time of the Summary of Evidence has not yet been allotted a defending officer, he should be protected against errors that may prejudice his case; in particular his questions to witnesses at the taking of the Summary of Evidence may by implication admit the charge against him; and he should also be discouraged from making a statement at this stage. Both points may be overlooked by an inexperienced officer.

To be detailed to act as defending officer is universally considered an honour even more to be avoided than that of serving as a member of the court. Defending takes time and removes the officer from his platoon or his company. That officer is detailed who can best be spared, and he who can best be spared is not an officer with experience. In the Army, as elsewhere, the most unpopular occupations fall to the most junior. The adjutant who has to detail an officer tries his best, and boldly informs Captain Smith that he is detailed to defend Private Jones. He escapes quickly, but soon the phone is ringing and Major Brown is demanding to know how he is expected to run a company if his officers are to be whisked away on courts martial every other day; he adds a few offensive remarks about the general administration of the unit. The adjutant weakens and asks Major Brown if he has anyone in the company who could fill the post. Major Brown, reflecting that adjutants should not be crossed too frequently, promises to find Someone. And Lieutenant Thomas, who has always previously avoided this particular burden, finds greatness thrust upon him and curses the day. A few weeks later he is ' caught ' again for a second court martial, but the third time he successfully pleads that he has done his share, and another

untried officer is detailed. It is therefore extremely difficult for an accused to obtain the services of an experienced defending officer, and often the case for the defence is too clearly the result of a study of the Manual of Military Law combined with a failure to grasp its principles.

The president of the court is generally a permanent president of courts martial. His superior rank and greater experience make his position over the other members of the court dominant. On his shoulders finally rests the whole conduct of the court martial; his attitude to the charge, to the accused, to the defending and prosecuting officers and to the witnesses is the determining element in the case. It is to his conception of the nature of the judicial process that we must pay particular attention. Even a trained lawyer is not infallible, and the importance of taking into account the personality of a judge has been sufficiently stressed by jurists in this century. It would be vain to expect a man who has lived for ten or fifteen years as an army officer and who is then entrusted with the deciding of cases to be less fallible than a judge. Partiality may be unconscious, but a judge has trained himself to exclude as far as possible such irrelevant considerations as the personality, accent and general physical appearance of counsel, witnesses and the accused. The natural biases of any man are many and powerful, but a judge at least is trained to reduce his own to a minimum. A president of courts martial is not so trained. He has been trained as a soldier and is no better fitted by virtue of that training to act judicially than any other man. In one important respect he is less well fitted. If, as has been suggested, a permanent president of courts martial is handicapped by a burden of ' inarticulate major premises ', he rejoices in the possession of certain major premises that are vociferous. Whereas a judge of the High Court is not directly concerned with the effect of his decision except where matters of public policy intervene, a court martial president is intimately concerned with the effects of his decisions. He is first an Army officer. He is concerned with the efficient functioning of the Army, and when dealing with cases of desertion he is particularly articulate on two points: first, that the Army must be kept as near full strength as possible, and, second, that discipline must be maintained. In the civil courts it may be an axiom that it is better for nine morally guilty men to go free than that one innocent man should suffer; in the military courts the reverse is considered desirable. Desertions must be kept to a minimum,

the strength of the Army must be maintained, discipline must not be relaxed. The military court is not interested in axioms; it is not interested in justice; it is vitally interested in the effect of acquittals on the other members of its community. It has no body of case law to bind it nor on which it can rely; it establishes no precedent and its hands are free. Thus in desertion cases, as we have seen, the court looks at the length of the absence; if considerable, the sentence must be heavy. For the sentence to be heavy the finding must be desertion, not merely absence without leave. The heavier the sentence the greater its value as an example. Purely legal considerations, such as the intention of the accused when he absented himself, are disregarded. And as the purpose of the court martial is not justice but the maintenance of discipline, this is logical. The president, as an Army officer, is concerned with the fact that for a considerable period the Army has been weakened by the absence of the accused. Numbers must be maintained and the heavier sentence is given. Every conviction is reviewed by the office of the Judge Advocate General and, since it is that office which often considers the case before trial, objections have been raised that the reviewing may be valueless.

The defects of the system arise from two causes. First, the inefficiency, due to ignorance, of prosecuting and defending officers, resulting in unfairness to the accused at the taking of the Summary of Evidence and in the incomplete presentation of his case at the trial, and second, the military bias of the president resulting in an impatience with legal formalities and a consideration of the case based on the effects of his decision on discipline and not on the rights of the accused.

The report of the 1938 Committee [7] deals in part with these defects. It was set up ' to examine the existing system of trials by court martial under the Army and Air Force Acts and matters incidental thereto and in particular to consider whether it is desirable and practicable that a person convicted by court martial should have the right of appeal to a civil tribunal against his conviction '. The chairman was Mr. Roland Oliver, M.C., K.C. (as he then was), and the Committee consisted of two other K.C.s, an M.P., and two high-ranking officers, one from the Army and one from the R.A.F. The report is prefaced by a note from the Secretaries of State for War and Air, stating that since the recommendations relating

[7] Cmd. 6200.

to change in status of the Judge Advocate General and of his office cannot be implemented in wartime, it would be premature to indicate which of the recommendations are accepted by His Majesty's Government. The principal recommendations are three. First, that although that part of the J. A. G.'s office, which prepares cases for the prosecution and in serious cases supplies a Judge Advocate to sit with the court, is in practice separate from that part which reviews convictions and to that extent takes the place of a Court of Appeal, the former should be transferred to an independent directorate with a separate head responsible to the Adjutant-General [8]; second, that as the reviewing of cases in the J. A. G.'s office takes the place of all final appeals on questions of law and procedure, the status of the J. A. G. should not be merely that of an official liable to be dismissed summarily; the status and salary of his staff should also be reconsidered on the same basis [9]; third, all offences against the ordinary criminal law of the land when committed against the person or property of civilians should be tried by the civil courts, as a general rule.[10] Various suggested reforms are specifically not recommended. In particular, it was not recommended that *all* offences against the ordinary criminal law of the land should be tried by jury in civil courts [11] nor that there should be a right of appeal to civil courts.[12] The committee also recommended, inter alia, that reasoned answers by the J. A. G.'s office to petitions should be in writing [13]; that the J. A. G. should have power to hear arguments by prosecution and defence on any question [14]; that he should have power to obtain the opinion of the Court of Criminal Appeal on new or difficult points of law,[15] and that where a Judge Advocate sits with a court martial he should not retire with the court when it is closed for any purpose other than the consideration of the sentence.[16]

The Committee recognised that ignorance on the part of those administering the law is one of the most serious criticisms and approves a statement attributed to Field Marshal Lord Cavan, quoted in the report of the 1919 Committee [17] under the chairmanship of Mr. Justice Darling, ' . . . that the remedy

[8] Paras. 13–15.
[9] Para. 16.
[10] Paras. 20–21.
[11] Para. 20.
[12] Para. 22.
[13] Para. 23.
[14] Para. 24.
[15] Para. 25.
[16] Para. 26.
[17] Report of the Committee constituted by the Army Council to inquire into the law and rules of procedure regulating military courts martial (Cmd. 428).

for most of the hard cases complained of is to be found not so much in any great alteration of the existing law as in the more effective instruction of the proper tribunals for administering that law'. The Committee emphasised the necessity for improving the legal education of all officers functioning at courts martial, particularly the defending officer, and stressed that the strongest efforts should be made to ensure that the accused obtained the services of the officer he asked for. The Committee did not deal with the difficulties arising out of the taking of the Summary of Evidence, but suggested that a handbook should be issued to help officers who were concerned with courts martial.[18]

The prefatory note to the report accurately states that the existing court martial system is vindicated and that no right of appeal to a civil judicial tribunal is recommended, but it is submitted, with all respect, that the Committee did not in fact face up to the fundamental difficulty inherent in its terms of reference. Shortly stated, the difficulty is this. The Army is not and cannot be a democratic institution, and the relationship between the rulers and the ruled establishes nothing as of right to the latter. Those in power do not cease to form an oligarchy even when in these days they claim to draw recruits to their ranks from all classes of society, nor when they relieve those they govern from certain restrictions. Rights cannot arise when user is based on licence. Judges are drawn from the oligarchy and in the final issue must support their own cause. The purpose of criminal law in a democracy is to prevent crime as anti-social. The purpose of Army law is to make the Army efficient. The one looks to the betterment of society, the other to the maintenance of discipline. The Army, no doubt, recognises that its efficiency will be impaired if injustice is blatant and its members have a continual grievance, and therefore it relaxes restrictions and tries to avoid individual hardship; but the final emphasis remains unweakened. The antithesis is between the need for discipline and the right to justice, and the Committee did not, perhaps could not, find any synthesis. That the Committee realised the existence of the difficulty is clear, but it tended to skate lightly over the thin ice above it. The report states[19]; 'A citizen when he joins (the Army) voluntarily submits himself

[18] A handbook was issued during the war. The 1919 Committee had made a similar recommendation (para. 7). This Committee rejected the suggestion that the Summary of Evidence should not be before the Court at the trial (paras. 34–43).

[19] Para. 19.

to a regime which is based upon discipline. . . . The machinery for dealing with offences which affect discipline must be prompt and, if necessary, severe in its operation '. The first sentence has little relevance in these days of compulsory service, and this point was raised in Parliament during the discussions following on the Muar mutiny.[20] Dealing with the question whether all ordinary criminal offences should not be tried before civil tribunals and whether the accused should not be entitled to elect trial either by court martial or civil tribunal, the committee ' concluded unanimously that either course, in addition to arising a host of minor difficulties, would tend to operate unfavourably upon discipline and was therefore not to be recommended '.[21] On the right of appeal, the report states ' the essence of the great majority of military offences is that they are offences against discipline; and they certainly would seem to be better handled at every stage by persons who are familiar with service discipline and the general situation and surroundings of officers and men. . . . We have unanimously come to the conclusion that in the light of all the facts no such experiment is necessary, desirable or practicable, and that the present system, as a system, has fully justified itself. If the Committee's recommendation in paragraph 21 is adopted, civil trial (with its attendant right of appeal) will be provided for in all cases where discipline is unlikely to be thereby prejudiced '.[22] This calls for three comments. First, the phrase ' better handled ' must mean ' better handled for the maintenance of discipline ' and not ' better handled for the obtaining of justice '. Second, any system, *as a system*, fully justifies itself if it succeeds in its aim. Cannibalism is justified when the missionary comes to the boil; so is absolutism when all opposition has been suppressed. It is the aim that must be regarded, not the system. Third, there are many criminal charges, apart from those affecting civilians, which could be tried by a civil tribunal without any adverse effect on discipline; for example, criminal libel. On the other hand, there are many offences against civilians which do involve discipline; for example, larceny, when it takes the form of looting, and in fact all crimes against the civilian inhabitants of the country (other than the United Kingdom) in which the force is stationed. The Committee appears to confuse two questions by its reference, when dealing with the right of appeal from

[20] *Weekly Hansard*, No. 28, col. 790.
[21] Para. 20.
[22] Para. 22.

a court martial to a civil tribunal, to that part of the report dealing with trial in certain cases by civil tribunal in the first instance. It may be detrimental to discipline to allow a right of appeal from a court martial to a civil tribunal since military authority might be weakened by a reversal of its conviction, but it cannot be detrimental if the civil court tries the case from the outset. There is more respect for the blue policeman than there is for his red-capped ally.

The efficiency of an Army undoubtedly depends on its discipline. Even if we had reached the stage where each soldier 'knows what he fights for and loves what he knows', strict obedience to orders without discussion or argument would still be essential. The value of discipline is not so clear in peacetime to the self-respecting soldier, but it is amply proved in war when fatigue, misery and fear are present realities. So it cannot be denied that in the ultimate issue individual claims to justice must yield before the claims of military efficiency. The question then becomes: 'To what extent can the rights of the individual be protected without seriously impairing discipline?' and it is submitted that the present system does not merit the eulogies of the 1938 Committee.

First, there seems no reason why a soldier accused of an offence punishable by the ordinary criminal law of the land, whether the offence is against civilians or other members of the armed forces, should not if he chooses have the right to be tried by a civil court, provided that the offence alleged was committed within 100 miles of a competent civil court.[23] This right of election should also be extended to charges on military offences when in the opinion of the officer having power to convene the court martial, discipline would not be adversely affected. Second, where a soldier is charged with a military offence affecting discipline he should be tried by court martial with a right of appeal on questions of law and procedure to a Judge Advocate who would, in the presence of the accused, hear the argument submitted by both sides and make his decision.[24]

The following suggestions are made for the improvement of proceedings by courts martial. To ensure that the defending

[23] Cf. Army Act, 1881, s. 41.

[24] Cf. memorandum (para. 1) by Rt. Hon. Lord Hugh Cecil, M.P., in 1919, Committee Report, p. 12. His opinion there stated is that 'where an offence is no more than an ordinary civil offence it should be tried by the civil courts, even though an officer or soldier is the offender; but where the offence is not only an offence against civil society but has also a distinct effect upon the discipline or well-being of the Army, then, if the offender be an officer or soldier, it is rightly tried by court martial'.

and prosecuting officers efficiently perform their duties, proper courses of instruction of at least eight weeks' duration should be given to selected officers, who would on passing an examination then become qualified to defend and prosecute; without this qualification no officer would be permitted to 'practise'. It is not suggested that officers so qualified would then become whole-time advocates, but that the result would be that within any division or area sufficient qualified officers would be available if needed. Presidency of a court martial should be a permanent, whole-time appointment, and personnel should be drawn from those qualified officers mentioned above who have had considerable experience in courts martial. A further course of training would be necessary before any officer was permitted to preside. In all serious or difficult cases, the present practice whereby a Judge Advocate sits with the court would, of course, continue to be necessary. Such a system would ensure that the president had a knowledge both of regimental discipline and of military law, and would go far towards solving the fundamental antithesis between discipline and individual justice.

Finally, a legal adviser (qualified as barrister or solicitor) should be allotted to each division or area to supervise the work of the court martial president and of all others concerned in the administration of military law. The 1919 and 1938 Committees made similar recommendations.[25]

It is submitted that if such a hierarchy were erected and the other proposals suggested put into effect, the demand for a right of appeal to a civil court would disappear for the best of reasons: that the feeling of injustice had been removed.

J. A. G. Griffith.

[25] Cmd. 428, paras. 9–14; Cmd. 6200, para. 28 (b).

REPORTS OF COMMITTEES

MATRIMONIAL CAUSES

THE Matrimonial Causes Rules, 1947, which came into force on 1st May, give effect to a number of the recommendations of the Denning Committee, the reports of which have been commented on in the three preceding numbers of this Review.

We are indebted to the Marriage Law Reform Committee for a copy of a useful Memorandum [1] which they have prepared showing the extent to which the recommendations of the Denning Committee have now been carried out. Although much has been done, there are of course many recommendations, including some of those not requiring legislation, to which effect has still to be given, notably the abolition of a number of affidavits which the Committee rightly considered unnecessary and the readier admissibility of signed statements, affidavits and findings in previous proceedings. On these points the Attorney-General in replying to the debate in the House of Commons on 6th May, promised that further steps would be taken shortly. He stated that the amendments already made had reduced the average costs in undefended divorces from £75 to £66 15s. 7d. and that the additional recommendations would only reduce them by a further £4. No doubt this is so in the average case, but in the exceptional case, the readier admission of evidence might save a great deal more.

No action has yet been taken as regards the recommendations that require legislation, although here again the Attorney-General stated that they were under consideration. The most important of these recommendations is of course that the financial powers of Courts of Summary Jurisdiction should be increased.

It appears that nothing is to be done for the present as regards the major reforms in marriage guidance and reconciliation to which the Committee's final report was mainly devoted. The Lord Chancellor, when replying on 27th March to the debate on this subject in the House of Lords, said that in his view it would be fatal to take action while the number of divorces remained at its present level and that he proposed

[1] A limited number of copies (1s. each) may be obtained on application to the Secretary at the Committee's offices, 20 Buckingham Street, W.C.2.

to wait until the average yearly number had been reduced to about 10,000 cases which he thought would be the normal average. It is not altogether easy to understand why the greater number of cases should make needed reforms less urgent; one would have thought the contrary, particularly as regards improved arrangements for reconciliation. Moreover, the suggestion that the number of cases will shortly be reduced to anything approaching 10,000 cases seems to be wishful thinking. There is no present sign of a falling off in numbers and when the Rushcliffe Report is implemented (and the Lord Chancellor promised early legislation) there will be a further spate of petitions by those at present debarred by the expense.

Nevertheless, thanks are due to the Denning Committee for their outstanding achievements and to the Lord Chancellor for pressing through many of their recommendations so speedily. The Committee was appointed as recently as June, 1946, and already procedure in matrimonial causes has been accelerated to such an extent that 16,820 divorces were disposed of in the first quarter of this year. If the problem of expense remains, that of delay has been largely solved.

NOTES OF CASES

ADMIRALTY JURISDICTION IN RESPECT OF FOREIGN IMMOVABLES: NOTE ON 'THE TOLTEN'

Over half a century has passed since the decision of the House of Lords in the case of *British South Africa Co.* v. *Companhia de Mocambique.*[1] During that time practitioners and jurists alike have accepted the view that English courts had no jurisdiction to entertain actions relating to immovables situated abroad. Narrowly construed, however, the *Mocambique Case* decided no more than the lack of jurisdiction of English courts to entertain an action *in personam* for damages for trespass to foreign land. Based as it was on principles of jurisdiction generally—universally, one might almost say—accepted by the courts of civilised nations in the administration of the conflict of laws, this decision has stood unchallenged and undistinguished on broader grounds than it strictly claimed until Lord Justice Bucknill was called upon recently to decide the case of *The Tolten.*[2] The *Mocambique Case* had always been read subject to the exception of equitable jurisdiction *in personam* exemplified in *Penn* v. *Lord Baltimore*[3] and succeeding decisions. *The Tolten* has now provided the Admiralty Division with the opportunity of creating its own exception to the general rule of jurisdiction over foreign immovables.

The facts of the case are simple. The ship *Tolten,* while leaving the harbour at Lagos, collided with and caused damage to a wharf owned and occupied by the United Africa Company, the plaintiffs in the action. The ship having arrived at Liverpool, the plaintiffs started an action *in rem* in the High Court, claiming for damage caused to their wharf through the *negligent* navigation of the *Tolten.* The defendants objected that the High Court had no jurisdiction to entertain this action for damage to foreign land, and this preliminary issue of law was the only point before the court.

Bucknill, L.J., decided in favour of the plaintiffs on the wording of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (*a*) (iv), which gave to the High Court Admiralty jurisdiction over '*Any claim for damage done by a ship*', a

[1] [1893] A.C. 602.
[2] *United Africa Co., Ltd.* v. *The Owners of M.V. Tolten,* [1946] 1 All E.R. 79.
[3] (1750), 1 Ves. 444.

jurisdiction which may be exercised *in personam* or *in rem*.[4] The 1925 Act merely repeated provisions of earlier statutes defining Admiralty jurisdiction[5]; nor did the Judicature Acts, 1873–5, interfere with the pre-existing jurisdiction of the Court of Admiralty.[6] The learned Judge gave these statutory provisions the wide interpretation which their terms appeared to justify, despite the restrictive dicta of James and Mellish, L.JJ., in *The Mary Moxham*,[7] and the general observations of Herschell, L.C., in the *Mocambique Case*. In this view he was supported by a statement of Williams and Bruce[8] that 'Damage done by a ship to a pier or breakwater has been held to fall within the Admiralty Court Act, 1861, s. 7'. Lord Justice Bucknill's decision may be summed up in the concluding words of his judgment: '*To limit the plain words of the statute so as to exclude a claim of this kind seems to me to impose a fetter on the jurisdiction of the court to which the court should be slow to submit, and to limit unduly the right of the plaintiffs to arrest the ship which has done the damage*'. The reasoning is clear. Effect must be given to unambiguous statutory provisions, irrespective of general theories of the international basis of jurisdiction, the doubting dicta of earlier decisions, and the possible difficulty in the way of making a judgment effective.[9] It was a very English judgment, from which the defendants appealed.[1]

In the Court of Appeal Lord Justice Scott, in a lengthy judgment, characterised by care and enriched by comparative reference, dealt first with the corner-stone of the appellants' case—the *Mocambique* rule. He accepted, subject to one *caveat* and as a statement of '*our municipal rule of common law jurisdiction*'[2] the headnote of the principle in the *Mocambique Case* that '*The Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad*'. The *caveat* was directed to the facts of the *Mocambique Case*, which were a trespass to foreign land, not an Admiralty action. This attempt of the Court of Appeal to interpret and qualify a decision of the House of

[4] Supreme Court of Judicature (Consolidation) Act, 1925, s. 33 (2).
[5] Admiralty Court Acts, 1840 and 1861.
[6] *Bow, McLachlan & Co., Ltd.* v. *Ship Camosum*, [1909] A.C. 597.
[7] (1876), 1 P.D. 107.
[8] Admiralty Practice, 3rd ed., p. 74.
[9] *E.g.*, in an Admiralty action *in personam* where leave has been given to serve a defendant out of the jurisdiction under Order XI, r. 1, R.S.C.
[1] [1946] 2 All E.R. 372. The Court consisted of Scott, Somervell and Cohen, L.JJ.
[2] *Per* Scott, L.J., at p. 374.

Lords at once raises two observations: in the first place, it hardly seems logical to describe a rule governing jurisdiction over foreign land as a 'municipal' rule: it cannot be less than a rule of conflict of laws jurisdiction. Secondly, and more fundamental, the *Mocambique* rule speaks of the jurisdiction of the '*Supreme Court of Judicature*', not of one division of one court within the Supreme Court. If the House of Lords, dealing with a common law question, had intended its decision to be limited to matters of common law jurisdiction, it could have restricted its principle to the Queen's Bench Division.[3] On the other hand, there can be little doubt that the narrower construction put on the *Mocambique* rule by Lord Justice Scott finds much justification in the fundamentals of judicial technique, which make the special facts of a case the vocabulary of any decision upon them. But this foundation-stone of precedent is not always applied to decisions of the House of Lords with the same invariable strictness as that which governs the doctrine of precedent in lower courts.

One further point may be worthy of note on the *Mocambique* rule: that rule refers to actions for damages for trespass to foreign land; it does not *ipso facto* settle jurisdiction where either (*a*) some remedy other than damages is claimed (and here it leaves equitable jurisdiction intact); or (*b*) where the action is not laid in trespass. The forms of action are very much alive on this question, and the respondents properly avoided bringing action founded on trespass, claiming instead damages for negligence.

By and large, the judgment of Lord Justice Scott upholds Admiralty jurisdiction whenever a lien has attached to a ship in consequence of maritime fault. This gives a factual basis on a very short point to Admiralty jurisdiction over foreign land. That basis depends on the answer to a simple question —has, or has not, a lien attached to this ship within the jurisdiction of the court? The learned Lord Justice posed three questions in this case, the last of which was for him decisive. He asked, thirdly,

> '*If even the peculiar nature of Admiralty jurisdiction* in rem *does not of itself exclude the bar* (*i.e.*, the procedural bar of the *Mocambique* rule), *does the substantive law in Admiralty, that damage by a ship through its maritime fault ipso facto gives rise to a maritime lien in favour of*

[3] On the other hand, this principle did not affect jurisdiction of the Chancery Division over foreign land, which was *in personam* and not founded on actions for damages, but for equitable remedies.

the injured party, make the crucial difference, and enable, and indeed compel, the Admiralty Court to exercise its jurisdiction over the High Seas in an action in rem *against the ship for damage done by its negligent navigation to fixed property abroad, without regard to the procedural bar of the common law as enunciated in the* Mocambique Case ? ' [4]

One may, in passing, question this description of the common law bar as procedural, in view of the dictum of Herschell, L.C., in the *Mocambique Case*.[5] What is of greater import is Lord Justice Scott's view that the answer to his third question was a very definite ' Yes ', a view which rendered consideration of the other two questions largely superfluous. Accordingly the learned Lord Justice went at some length into the authorities, history and nature of maritime liens, and drew on his wide knowledge of foreign law and international maritime conventions to illustrate the general nature of such liens in maritime law. His comparative references, particularly to French law and its doctrines of ' *privilege* ' and ' *droit d'abandon* ', constituted a technique which, adopted with caution, could establish a valuable precedent in judicial reasoning, but in the present case illustrated the degree, rather than the fact, of the common nature of general maritime law.[6] The tendencies of this general maritime law argued against the *Mocambique* rule, and Scott, L.J., was satisfied that ' *the answer of the respondents based on the maritime lien alone is enough of itself to dismiss the appeal* '.[7] But one question, which may be thought relevant, was, according to the report of this case, never asked and never answered. Simply this : Had a maritime lien *in fact* attached to the *Tolten* ? Unless such a lien had attached, the court could hardly base its jurisdiction upon it. Indeed, other grounds, such as that of simple causation of damage,[8] of effectiveness or of simple presence of the defendant ship within the jurisdiction could have been invoked. Dicey stood on firm ground in basing Admiralty jurisdiction on the principle of effectiveness.[9] Since the basis

[4] *Id.*, at p. 375.

[5] ' . . . the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions for trespass to land situate abroad were substantial and not technical ', [1893] A.C. 602, 629.

[6] *E.g.*, there are considerable differences in principle between the ' *droit d'abandon* ' and the English principle of limitation of shipowners' liability introduced by the Merchant Shipping Act, 1854.

[7] [1946] 2 All E.R. at p. 377.

[8] Which itself may create a lien.

[9] *Conflict of Laws* (5th ed.), Rule 61, p. 269; Wolff, *Private International Law*, p. 73.

of Admiralty 'damage' jurisdiction, according to *The Tolten* decision, is fault,[1] one may wonder how jurisdiction on that basis can be exercised before fault, as distinct from damage, is proved.[2] It is, of course, possible to presume fault as giving rise to a provisional lien, thereby conferring jurisdiction to inquire into the existence and liabilty for the fault. The strongest objection to this assumption is the possibility of damage without fault, as sometimes happens through uncontrollable collision of ships in a severe gale. This objection does not arise if damage itself is accepted as creating a lien on any ship causing the damage, whether or not at fault. It appears that the Court of Appeal in *The Tolten Case* assumed that a lien, based on maritime fault, existed. '*In the present case there is naturally enough no averment in the defence that by the law of Lagos the ship is not liable.*'[3] Authority exists for basing the lien purely on the fact of damage caused by a ship, irrespective of fault. The basis is not liability, but causation. 'A maritime lien for damage done by a ship attaches that instant upon the vessel doing it . . . and being perfected by proceedings *in rem*, relates back to the moment when it first attached.'[4]

The Court discarded the common law principle of jurisdiction over foreign land because '*The* Mocambique *rule is, in short, a conception wholly foreign to the essential nature of Admiralty jurisdiction, as shown by its history, judicial and Parliamentary*'[5]: just, one may add, as land is a conception wholly foreign to the essential nature of ships, so that questions of wrongs done by ships to land are very exceptional and not normally within the contemplation of courts or Parliament. When Admiralty jurisdiction was being extended in the fourteenth century by Edward III after the Battle of Sluys, there was no thought of injury to land. Jurisdiction was a judicial aspect of command of the narrow seas. Jurisdiction had a political, not a legal foundation: its basis was might, not right.

To Lord Justice Somervell fell the task of considering the exception created by equity to the general limitation on jurisdiction over foreign land. While in his view the existence of

[1] *Id.*, at p. 377 G.
[2] See dicta of Sir John Jervis in *The Bold Buccleugh*, 7 Moo. 267, at 284; and Gorell Barnes, J., in *The Ripon City*, [1897] P. 226, at pp. 241, 242, cited by Scott, L.J., [1946] 2 All E.R. 372, at p. 376.
[3] *Per* Scott, L.J., [1946] 2 All E.R. 372 at p. 384.
[4] *Maclachlan on Merchant Shipping*, 7th ed., p. 239.
[5] *Id.*, at p. 381, *per* Scott, L.J.

one exception did not of itself justify the creation of another, the significance of the equitable doctrine was that it '*negatives any suggestion that the courts have recognised a general principle that no decisions will be given which may determine or affect rights in or over foreign land*'.[6] The third member of the court, Lord Justice Cohen, while in general agreement with the preceding judgments, based his decision on the comity of nations. In the particular case, comity may be a dangerous argument. It certainly supports the *Mocambique* rule, and is correspondingly inappropriate to any exception from that rule, unless tempered by principles such as those in equity, in its jurisdiction in respect of foreign land.

Leave was given to appeal to the House of Lords; but the result of the decisions in *The Tolten*, both at first instance and in the Court of Appeal, would seem unlikely to be disturbed. The *Mocambique* rule, if strictly interpreted, would not apply to an action founded on negligence; and the statutory jurisdiction of the Admiralty Division is wide enough to cover damage done in Lagos harbour. Jurisdiction, it is submitted, existed primarily because the *Tolten* was in an English port and had caused damage. It is a straightforward question of effectiveness within the broad statutory principles of Admiralty jurisdiction.

R. H. GRAVESON

JOINT TORTFEASORS—ACCORD AND SATISFACTION—COVENANT NOT TO SUE

'IT is clear law that a release granted to one joint tortfeasor . . . operates as a discharge of the other joint tortfeasor . . . the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released . . . a covenant not to sue one of two joint [tortfeasors] does not operate as a release to the other . . . , the reason being that the joint action is still alive'; *per curiam*, in *Duck* v. *Mayeu*, [1892] 2 Q.B. 511 (C.A.) at 513. This state of the law, left untouched by the Law Reform (Married Women and Tortfeasors) Act, 1935, provided the background against which was decided the recent case of *Apley Estates* v. *De Bernales*, [1946] 2 All E.R. 338 (Evershed, J.)—a number of co-plaintiffs sued a number of joint tortfeasors in conspiracy. After the action had begun, the co-plaintiffs all agreed with one of the tortfeasors not to pursue their cause of action against that

[6] *Id.*, at p. 387.

particular tortfeasor in consideration of £25,000, the material terms of the agreement reading:

> In consideration of the payment etc. . . . . the plaintiffs will not nor will any of them sue or continue to sue the said defendants in respect of any of the matters the subject matter of the said actions or either of them or in respect of their respective claims in respect of such matters or any of them but this agreement shall not be construed or operate as a release of any cause of action of the plaintiffs or any of them against the defendants or any of them in the said actions or either of them and shall not prejudice or affect the rights of the plaintiffs therein to proceed with their claims therein against the defendants other than the ['said defendants'].

On the assumption that leave (under R.S.C. Order 24, r. 2) to put in a new matter of defence, had been granted, three contentions were raised by the defendants and dealt with as follows: first, the learned Judge held that a fair construction of the agreement yielded a mere covenant not to sue the particular tortfeasor concerned. It did not operate to extinguish tortious liability by way of accord and satisfaction.

Secondly, though the agreement in *Duck* v. *Mayeu* was substantially on all fours with the present agreement and was similarly construed, the defendants argued that a material distinction lay in the fact that the *Duck* v. *Mayeu* agreement was concluded *before* the action commenced. Evershed, J., held that this point was not material, citing in support the judgments in *Duck* v. *Mayeu* itself together with 'the language of Vaughan Williams, L.J., in *Rice* v. *Reed*, [1900] 1 Q.B. 54'. The language of the learned Lord Justice must today, perhaps, lose force in view of the fact that a reason he stated for his opinion was that there is no contribution between joint tortfeasors (at 67).

Defendants clutched at a final straw. Their argument was that the agreement should be treated procedurally, in which event it amounted to a payment into Court in satisfaction of the claim (R. S. C., Order 22). The learned Judge dismissed the contention lightly. We respectfully suggest that to have succeeded, it would have been necessary to show that the arrangement fell within the terms of Order 22. As there was not at any stage a payment into Court, this limb of the defence appears as nothing but a very wild shot.

Leave to appeal was granted.

C. G.

NUISANCE—FOOD QUEUES

IT is a fact, universally acknowledged among lawyers, that the law of nuisance represents fundamentally a balancing of conflicting interests; and the Courts have, in each case, to find the point of balance.

This principle applies equally to a nuisance arising out of an individual's use of the highway. For example, a person with premises adjoining the highway may make use of the highway in order to bring fuel on to his property, or to erect scaffolding and hoardings for the purpose of repairing his house or shop, but he must not thereby cause any greater obstruction than is reasonably necessary.[1] Queues, it is submitted, are in exactly the same legal position. When a queue forms outside a shop or theatre, the theatre-occupier [2] and the shopkeeper who puts provocative effigies in his window [3] are both making use of the highway. That is to say, both are causing people to collect on the highway outside their premises, and, provided the causal link between crowd and occupier is established, their liability (if any) will depend on whether the crowd or the queue constitute a nuisance, *viz.*, whether the occupiers are, through the queues, making an unreasonable use of the highway. There are, however, two points of distinction that may be taken between queue and other cases:—

(1) normally, the kind of damage inflicted by a nuisance-queue takes the form of loss of trade to neighbouring shopkeepers. A state of conflict of authority still exists officially as to whether loss of trade is not too remote a consequence of the nuisance. But modern judicial opinion favours *Wilkes' Case* [4] (rather than *Ricket's Case* [5]) where loss of custom was held to be a sufficiently proximate or direct consequence of a highway nuisance; so that, on this point, probably no peculiarity attaches to the queue cases [6];

(2) where an occupier obstructs the highway with scaffolding or with men bringing fuel to his premises, his causal responsibility for the obstruction is plain. In the 'queue-type of case', the causal connection

[1] Compare Romer, L.J., in *Harper* v. *Haden*, [1933] 1 Ch. 298 at 319. Also Byles, J., in *Herring* v. *Metropolitan Board of Works* (1865), 19 C.B. (N.S.) 310 at 312.
[2] *Barber* v. *Penley*, [1893] 2 Ch. 447; *Lyons* v. *Gulliver*, [1914] 1 Ch. 631.
[3] *R.* v. *Carlile* (1834), 6 C.&P. 636.
[4] 2 Bing. N.C. 281.
[5] L.R. 2 H.L. 175.
[6] In the case under review, Atkinson, J., seems impliedly to accept the modern interpretation: *Dwyer* v. *Mansfield*, [1946] 2 All E.R. at 248.

between queue and conduct of occupier requires to be demonstrated more explicitly. In other words, the question of fact in this respect entails a heavier burden of proof.

The foregoing thesis constitutes the measure against which we examine *Dwyer* v. *Mansfield*, [1946] 2 All E.R. 247 (Atkinson, J.). There, M.'s greengrocery shop was situated between the shops of D. and K. As M. received his quotas of foodstuffs, he sold them out, and, owing to the post-war conditions of scarcity, large numbers of customers formed queues on either side of his entrance. The worst queues resulted from the period of potato shortage when M. rationed out 1 lb. of potatoes to each of his customers so that more persons obtained their fair share and the queues grew proportionately larger. The learned Judge found as fact that the businesses of D. and K. had not been so interfered with as to constitute a nuisance, nor had they suffered any damage. He added (what appears to be *dictum* only) that even if D. and K. had suffered damage from the queues, this nuisance would not have been ' due to something for which the defendant was to blame, due to an unlawful act, due to something which was unnecessary and unreasonable and, therefore, unjustifiable ', because M. had carried on his business in a reasonable and necessary fashion. In elaborating this assertion, Mr. Justice Atkinson said something which was rather different, *viz.*, that M. had not, by his conduct, created the queue; it was caused by the potato shortage.

Restating these two separate contentions, they are:—

(a) that, though M.'s conduct caused the queues, it was not unreasonable or unnecessary conduct. Therefore, M. was not responsible;

(b) M.'s conduct did not cause the queues.

Contention (a) is open to the serious objection that it does not embody correct law. In the *Theatre Cases* (cited *ante*), the manner in which defendants ran their theatres was quite reasonable and necessary. They were not thereby exonerated for the nuisance caused by the queues outside their theatres. It is the reasonable or unreasonable use of the *highway*, not the unreasonable or reasonable use of one's own premises which, in this class of case, is the crux of the matter. The decisive factor is the nature of the queue.

Criticism must be levelled at contention (b) as well. At all times, theatres attract queues. They have this effect because people like plays, but the occupiers of theatres cannot

seize on this fact to escape liability for any nuisance caused by the queues outside their premises. They have not been allowed to argue that it is the popular appeal of the theatre that causes theatre-queues, not the fact that they happen to be running a particular kind of business. As North, J., said in *Barber's Case*[7]: 'As regards the defendant's suggestion that he could not help it, if in point of fact the nuisance exists which is caused by him, not with an object to cause the nuisance, but by reason of the entertainment he carries on, and to which he invites the public to come, it seems to me that it is a case in which either he must discontinue his performance or the nuisance must be prevented.' Substitute 'greengrocery business' for 'entertainment' and 'business' for 'performance' and we have what, in our respectful submission, is the attitude the Court should have adopted in the instant case. For, whilst in normal pre-war years the greengrocery business was not such as to attract street queues to it, in this year of shortage, A.D. 1946, it is common knowledge that if one opens a greengrocery shop there will be queues to cope with. Today, in both the theatre and greengrocery worlds, queues are inevitable, on the one hand because people like to see plays, on the other because people need to eat. The greengrocer, like the person who runs a theatre, should not be suffered to plead in exoneration the extraneous, compelling motive; in undertaking or continuing his business today, the greengrocer is impliedly, in our submission, responsible for the unavoidable queues.

Mr. Justice Atkinson appears to have been influenced to a certain degree by the trouble to which a food shopkeeper would be put if he had to keep an eye on his queues: 'It would really mean that they would be carrying on a necessary business under quite intolerable conditions' (at 251). But, in our respectful submission, those conditions would not be intolerable. Street queues are not nuisances *simpliciter*. On the contrary, Judge after Judge has agreed that they are an institution of great civic virtue; Atkinson, J., himself says of queues: 'They are evidence of a respect for fair play and orderliness. . . . They are much better than merely crowds, each struggling to get in first.' Queues are only nuisances *sub modo*; and the cases go to show that if a queue that overlaps neighbouring premises is marshalled in an orderly way on the outside of the pavement, with gaps in it to afford

[7] [1893] 2 Ch. at 459. See also, *Lyons* v. *Gulliver*, [1914] 1 Ch. at 647.

reasonable access to adjacent premises,[8] it will not be a nuisance. There is only a shortage of food in this country; the situation is not so desperate that it has shattered the self-discipline of our society. With queues of a certain size, the requirement that the food shopkeeper should marshal it after the manner indicated above would seem to be neither impossible nor over-onerous.

But suppose for the moment we accept (as we doubtless must) Mr. Justice Atkinson's opinion that, if a food shopkeeper is carrying on his business in a reasonable way, he cannot be pinned with responsibility for food queues outside his shop. At its logical, and perhaps fantastic extreme, this judicial finding would condone a situation where the queue from a greengrocer's wound itself round a block like a boa-constrictor, squeezing the trade out of all the other businesses. We would urge that a reading of the law which might produce such a consequence is not justifiable save by reason of the existence of some overriding public interest. Now, the learned Judge did not base his opinion on public policy, nor, indeed, can we see how he could have done so. Public interest appears to lean rather the other way: the country is not hanging on to the verge of existence; it is recovering and reconverting from war-time conditions, and to that process of recovery and reconversion the carrying on of businesses other than the distribution of food is just as important as the running of food-distributing shops. Consequently, food shopkeepers should not be allowed to plead smugly that the nuisance-making queues are the result of the food shortage; there would seem no good reason for treating them as a privileged class.

Therefore, with great deference, we suggest in conclusion that the rightful principle to apply in such cases might be found in a rule along the following lines: that where a person makes such use of his property that, in the normal course of events, the use of the highway will be obstructed, he must take steps to see that the dimension of the obstruction is not unreasonable in quantum or duration and that reasonable access to his neighbours' premises is not blocked. 'The normal course of events' would vary, of course, with the vicissitudes of contemporary circumstances.

C. G.

[8] If the queue is a very long one, the gaps would be essential: *Lyons* v. *Gulliver*, *loc. cit.* at 640, 641.

NUISANCE—INJUNCTION

FROM the point of view of law, there is nothing new in *Maberley* v. *Peabody*, [1946] 2 All E.R. 192 (Stable, J.). It is a noteworthy case, however, for its nice illustrative qualities.

Dr. Maberley and Rowland Smith were adjoining land owners. Each owned his side of the dividing wall up to the middle line. Smith allowed R. S. Motors, Ltd. to occupy his land under an agreement till February, 1941. While in occupation R. S. Motors, Ltd. heaped a mound of soil and refuse against the wall. It was held as a matter of fact that this mound imposed an undue and harmful strain upon the wall and that, at the time of the action, the wall (including Dr. M.'s side) was beginning to crack and bulge as a result. Despite protestations from Dr. M., nothing was done to remove the pile. On the termination of occupancy by R. S. Motors, Ltd., occupation of the land reverted to S. Shortly afterwards, the land was leased out to Peabody & Co., in whose occupation it had since remained. Neither S. nor P. took any steps to remove the mound. Additionally, Peabody's from time to time cast small quantities of chemicals on the mound. These apparently dissolved in the moisture present, percolated in solvent form into and through the wall, and by their action were hastening the wall's disintegration.

The legal questions that emerged fell apart neatly into three sections:—

1. Was there a nuisance, and if so, when did it start? Held: there was undoubtedly a nuisance which dated from the time that undue burden was imposed on Dr. M.'s wall; 'from that very moment the wall sustained damage, that is to say, it was subjected to a pressure or to a strain, an actual measurable physical impact, which was harmful to the wall and which must in the course of time ultimately result in its destruction'. The last qualifying clause, though true of the facts at the time, would not appear strictly necessary as a legal prerequisite.

2. Who was, or who were, responsible for the nuisance? There were two sources of nuisance:

(a) As to the mound, Smith, R. S. Motors, Ltd., and Peabody's were all three liable; R. S. Motors, Ltd., because they had deliberately created the nuisance, Smith, because, during his interim occupancy of the land he had continued the nuisance, despite the fact

that he knew of it (through the imputed knowledge of his agent), or ought reasonably to have known of it, seeing it was utterly manifest. Peabody's, finally, were liable for continuing a nuisance of which they knew.

(b) As to the chemical position, R. S. Motors were out of the picture before this source of trouble began. Peabody's, of course, were liable since they had deliberately started the trouble. But Smith was not responsible here because this particular nuisance was a latent one of which he neither knew nor could reasonably be expected to have known. One might with respect query whether under the circumstances S. could have been liable even if he did know, seeing that in relation to the chemical nuisance he had never been in due occupancy of the land.[1]

3. What was the appropriate remedy, damage or an injunction? The answer was both. First, damage sustained so far by Dr. M.'s property might be assessed against the three defendants. But, since Dr. M. had not yet sustained any substantial damage and, if the nuisance were removed, the wall would never collapse at all, Mr. Justice Stable decided that the arrears of damage should stand over. However, an injunction to restrain the continuing of the nuisance would issue by reason of applying the 'good working rule' laid down by A. L. Smith, L.J., in *Shelford* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. at 322, 323 (at 195 in the instant case).

As is pointed out by the learned editor of All E.R., the main social impact of this case is likely to be felt today on bomb-damaged sites where debris is normally piled up against the walls of adjoining property.

C. G.

BREACH OF STATUTORY DUTY—STATUTORY PENALTIES—ACTION IN DAMAGES

Where damage results from a breach of statutory duty, it is usually a matter of serious concern for the injured party to know whether an action for damages has been created or derived by the statutory provisions. *Cable* v. *Wandsworth Stadium, Ltd.*, [1946] 2 All E.R. 187 (Oliver, J.), involved

[1] See Halsbury: *Laws of England* (Hailsham ed.), Vol. XXIV at 86, 87.

the Betting and Lotteries Act, 1934, s. 11 : sub-section (2) (b) provides that :—

> The occupier of a licensed track . . . shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day . . .

A contravention of this sub-section amounts to an offence under the Act, entailing certain heavy penalties.

At this point, then, we can classify the instant statutory provision as being a case ' where a liability not existing at common law is created by a statute which, at the same time, gives a special and particular remedy for enforcing it '.[1]

The preliminary issue of law before Oliver, J., was whether, notwithstanding the statutory penalties, a right of action for damages lay open to a bookmaker injured by a breach of the statutory duty on the part of ' the occupier of a licensed track '. The learned Judge held that an action for damages did lie, on the following grounds : ' Some of the authorities are not easy to reconcile. But it seems to me that this principle does emerge : Where the Legislature has provided for the protection of a specified class of the public, even though it has also provided penalties in respect of a breach of the enactment, members of that specified class who suffer injury from a breach of the provision, have a right of action, . . . [and] . . . bookmakers ply their trade on the dog tracks and are a specified class of the public ' (at 188).

Though the conclusion reached by Mr. Justice Oliver may be unobjectionable, one must demur against the grounds that the learned Judge gave for his decision.

If by ' principle ' Oliver, J., was intending to mean the governing legal principle in such cases, his statement is not ' consonant with all the authorities ' at all, for the well-established governing principle here is that each statute must be interpreted according to its own merits. If, however, the learned Judge was referring to a rule of interpretation when he used the expression ' principle ', then, in our respectful submission, his statement of the applicable rule was too strong and went too far.

Vaughan Williams, L.J., in *Groves* v. *Wimborne*, [1898] 2 Q.B. (C.A.) at 415, 416, commenting merely on the

[1] Halsbury : *Laws of England* (Hailsham ed.), Vol. I at 11.

consequences of a breach of statutory duty without considering the effect of the provision of a statutory penalty [2]; said, '. . . it cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty' In *Phillips' Case*, [1923] 2 K.B. 832, Atkin, L.J. (as he then was), expressly differed from McCardie, J., in the Court below in asserting that, 'the question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community . . .' (at 841). This statement was taken up with approval in *Monk* v. *Warbey*, [1935] 1 K.B. at 85 (Maugham, L.J.). Two further authorities fall to be noticed. In *Read* v. *Croydon Corpn.*, [1938] 4 All E.R., Stable, J. (at 652), deals with the case of a statute that contains a remedy, and after mentioning the main principle 'that the dividing line is to be found in the intention of the Act', goes on to say that *one* of the means of determining that intention 'is to ascertain whether the duty is a duty owed primarily to the State . . . , and only incidentally to the individual, or primarily to the individual or class of individuals, and only incidentally to the State'. By these words, presumably the learned Judge was implying that where the duty is owed to a specified class of the public, the members of that class are *prima facie* entitled to an action for damages. There is, finally, a troublesome *dictum* of Lord Atkin himself,[3] which runs: 'The duty may, however, be imposed for the protection of particular citizens or class of citizens, in which case a person of the protected class can sue for injury to him due to the breach.' As the passage in which this *dictum* is found does not refer to authorities, and as it is couched in highly condensed and perplexing language which makes it uncertain whether his Lordship is referring to statutes which provide penalties or those which do not; whether he is stating a rule of construction or laying down a

[2] A reference to the rule that where a statutory remedy is contained in the Act, it is *prima facie* an exclusive remedy: *Pasmore* v. *Oswaldtwistle U. D. C.*, [1898] A.C. at 394 (Lord Halsbury), 397, 398 (Lord Macnaghten); *Phillips* v. *Britannia Hygienic Laundry*, [1923] 2 K.B. at 841 (Atkin, L.J.); *Monk* v. *Warbey*, [1935] 1 K.B. at 84 (Maugham, L.J.), approved by Slesser, L.J., in *Square* v. *Model Farm Dairies*, [1939] 2 K.B. at 375, 376.

[3] In *East Suffolk Rivers Catchment Board* v. *Kent*, [1941] A.C. at 88.

governing principle, these particular remarks, it is submitted, cannot really be taken to have turned the consistent tendency of opinion in previous cases.

But the resultant of the foregoing authority is not quite definite. At its highest, one might deduce a rule operating *prima facie* only to give members of a specified class an action for damages; but even in this case, it would only be a rule of *prima facie* strength; not a conclusive test as Oliver, J.'s language would lead one to imagine.[4] Perhaps the more balanced conclusion would be, that where a statute, providing penalties of its own, gives protection to a specified class of the community, this fact is available merely as an element to be considered in interpreting out of the statute a right to an action for damages in the event of a statutory breach. It is all simply a question of construing the statute.

The learned editor of *Salmond* feels that this result leads to 'an undesirable uncertainty'[5]; to which we may be permitted to reply that, so far as statutes already construed are concerned, there is no uncertainty; as for future statutes. Mr. Justice Oliver's way is too arbitrary and inelastic. We are living in a time of change when many more statutory provisions are going to require interpretation. In a dynamic social environment, it seems essential that the Bench should have a wide discretion in this respect. C. G.

REVIVAL OF CONDONED ADULTERY

IN *Lloyd* v. *Lloyd & Hill*, [1947] 1 All E.R. 283; 63 T.L.R. 110, Hodson, J., appears to have decided two important questions arising out of the decision in *Beard* v. *Beard*, [1946] P. 8, where the Court of Appeal established that condoned adultery may be revived by desertion for less than three years.[1] These two questions may be put as follows:—

(1) If the subsequent desertion comes to an end because the respondent makes, or has made, an offer to return, can the petitioner still rely on the condoned adultery?

(2) Does the revival of the condoned adultery enable the petitioner to maintain a claim for costs and damages against the co-respondent?[2]

4 Cf. Winfield: *Text-book of the Law of Tort* (3rd ed.) at 155.
5 Salmond: *Law of Torts* (4th ed.) at 509.
1 See Mr. R. Else Mitchell's article at MOD.L.REV. July, 1946, p. 137, for a full discussion of the implications of this decision.
2 This question is not confined to cases of the *Beard* type, but under the present law it must be chiefly in cases of that type that it arises

In *Lloyd* v. *Lloyd & Hill* the facts were these. The parties were married in 1936, and in 1945 the respondent committed adultery with the co-respondent. The petitioner filed a petition dated November 24, 1945, on the ground of this adultery, but subsequently took his wife back, and the petition was dismissed on January 2, 1946. The reconciliation did not, however, last long and on January 11, 1946, the wife deserted the petitioner who filed a second petition dated January 17. This second petition, which is the one with which we are concerned, set out the resumption of cohabitation and alleged desertion reviving the condoned adultery.

On the first question Hodson, J., said the respondent being in desertion at the date of presentation of the petition there was revival as against her under *Beard* v. *Beard*, and as he understood that decision the revival of the adultery was not cancelled by the respondent making an offer subsequently to come back to her husband. This seems to be the logical result of *Beard* v. *Beard*, though it may add force to the dissenting judgment of Vaisey, J. There is nothing conditional about revival, and once revival has taken place the continuance of the desertion is no more important than its duration. The respondent may repent of her desertion, but she cannot repent of the revived adultery, unless, of course, the petitioner accepts the offer to return and condones the adultery anew. In *Lloyd's Case* the offer was made after the petition; suppose it had preceded the petition? In principle there appears to be no distinction, because the petitioner is relying not on the desertion, but on a state of affairs which came into existence immediately the desertion took place and is not affected by its termination.

The second question is more difficult. On the one hand it can be argued that the co-respondent obtains, as it were accidentally, the benefit of the petitioner's forgiveness of his wife. So long as the condonation holds good the co-respondent is immune merely because a petition against the wife must fail; once the wife loses her defence the co-respondent must also lose his, which can be no different. On the other hand it may be said that condonation should not be conditional as regards the co-respondent since he may not have any control over the wife's conduct. Both arguments spring from the basic difficulty that for the co-respondent both condonation and revival are *res inter alios actæ*.

The text-book writers are against the co-respondent's

liability and quote two authorities.[3] In *Bernstein* v. *Bernstein*, [1893] P. 292, the husband petitioner proved adultery with two co-respondents, but the adultery with A had been condoned. At the time of condonation the petitioner was ignorant of the adultery with B, which had already taken place. The Court of Appeal upheld a decision granting a decree on the ground of the adultery with B and dismissing with costs a claim for damages against A. In *Norris* v. *Norris, Lawson & Mason* (1861), 4 Sw. & Tr. 237, the wife respondent committed adultery with Lawson, which was condoned, and later eloped with Mason. The adultery with Mason was proved as against the respondent, but by evidence inadmissible against Mason himself, and the petitioner asked for an order for costs against Lawson. The Judge-Ordinary refused to make such an order, saying:

> 'The petitioner, by condoning his wife's adultery, has waived all right to any proceedings against the co-respondent (Lawson) in this court. The usual course is to grant costs against a co-respondent when his conduct has made a suit necessary. Here the wife's subsequent misconduct, and not her adultery with Lawson, rendered the suit necessary. I cannot condemn Lawson in costs'.

In *Lloyd's Case*, Hodson, J., was able to distinguish both these decisions. He pointed out that in *Bernstein* v. *Bernstein* no question of revival arose, and that passages directed against the proposition that the past cannot be brought up do not assist because revival is part of the law of England. In *Norris* v. *Norris* the judge was only exercising his discretion as to costs, and used language going further than he need. Freed of these decisions, Hodson, J., said that it was 'a very odd proposition that because the co-respondent has nothing to do with the condonation and the revival he should get the benefit of the condonation and not lose that benefit when the wife loses it by her own conduct. . . . If there has been revival condonation does not exist as a bar'. He accordingly awarded costs and damages against the co-respondent.

This is a decision to be welcomed. There are some cases, as indicated by the Judge-Ordinary in *Norris* v. *Norris*, where a co-respondent is not morally responsible for the wife's conduct subsequent to the condonation, but there must be many more where the desertion takes place either as a result of the continuing influence of the co-respondent or of the deterioration

[3] *E.g.*, Rayden, *Divorce*, 4th ed., pp. 136 and 341; Tolstoy, *Divorce Law and Practice*, p. 155.

in the wife's character caused by her original association with him. Here justice requires that the co-respondent be liable, and if his liability is established as a general principle the court, in the exercise of its discretion as to costs and in the amount of damages awarded, is well able to reflect the varying degrees of culpability.

Unfortunately the matter cannot be left here. To return to the reports [4] of *Lloyd's Case*, it seems that after the case had been opened the court invited counsel to investigate the facts subsequent to the desertion, and as a result of the evidence given on the resumed hearing found that further adultery had been committed by the respondent and co-respondent after the date of the desertion. Hodson, J., proceeded, however, to consider the case on the pleadings with the result noted above; since no amendment of the pleadings was ordered, it is submitted that the legal effect of revival was the ratio decidendi of the condemnation of the co-respondent in costs and damages, although on the facts he would have been equally liable on the ground of the subsequent adultery.

The authority of Hodson, J.'s, decision on the legal effect of the offer to return is still further weakened by his observation, 'I think that the offer of the wife can in any event be disregarded'. If this was his finding of fact, it is difficult to see that his views on this legal point were anything but obiter.

Finally, it may be mentioned that Hodson, J., did not find it necessary to consider an interesting submission of the petitioner's counsel that a renewal of the association with the co-respondent, even if not adulterous, might revive the condoned adultery. There is much to support this contention, both in the language of the majority judgments in *Beard* v. *Beard* and in the analogy of the cruelty cases.[5]

J. P. Lawton.

Responsibility for Animals Straying on to Highway

In *Hughes* v. *Williams*, [1943] 1 K.B. 574, the Court of Appeal invited the House of Lords to overrule, or modify, the view that 'there is no duty on the owner or occupier of land adjoining the highway to prevent animals on it from escaping on to the highway' (*per* Lord Wright, obiter in *Bracken-*

[4] The All England Report is unfortunately defective in not dealing with the full facts.

[5] Cf. *Bertram* v. *Bertram*, [1944] P. 59.

borough v. *Spalding U.D.C.*, [1942] A.C. at p. 321). Lord Greene, M.R., described it as 'ill adapted to modern conditions'. His opinion was echoed by MacKinnon and Goddard, L.JJ. Nevertheless, the House of Lords in *Searle* v. *Wallbank*, [1947] 1 All E.R. 12, emphatically refused the invitation.

The facts in *Searle* v. *Wallbank* were obscure, but fortunately need not be repeated because the majority of the House (Viscount Maugham and Lord Porter explicitly) chose to treat the respondent, the owner of the adjoining land and of the horse which escaped therefrom and collided with the cyclist appellant, as 'negligent' in the sense that he had failed to use reasonable care to retain his animal. In spite of this they adopted the extreme view of Cozens-Hardy, M.R., in *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K.B., at p. 376—'it is no breach of duty not to prevent harmless animals like sheep from straying on to the highway, and it makes no difference whether the action is sought to be based on negligence or on nuisance'. By necessary implication they rejected the views of Vaughan Williams, L.J., in *Ellis* v. *Banyard* (1911), 106 L.T. 52, who would have preserved the duty, however lightly it might be laid upon the landowner in fact, and of Lords Dunedin and Atkin in *Fardon* v. *Harcourt-Rivington* (1932), 146 L.T., at p. 392, who were no doubt concerned not to do violence to the universal duty to one's neighbour in negligence. (The speeches in the latter case were made within a few months of *Donoghue* v. *Stevenson*, [1932] A.C. 562.) Now *Searle* v. *Wallbank* must take its place along with *Derry* v. *Peek* (1889), 14 App.Cas. 337, and *Cavalier* v. *Pope*, [1906] A.C. 428, as another puncture in the protective garment of liability in Tort.

It is important to probe the grounds for this decision if we are to understand its limits and some of the paradoxical consequences that may flow from it. Both Viscount Maugham and Lord du Parcq justified their opinions on the practical conditions of rural life. They spoke of the difficulties of the farmer in war-time, of the behaviour of visitors in leaving gates open, of the ease with which pigs and fowls can get through hedges and of the ability of horses to jump them. With great respect, these considerations surely go to the degree of care that might be imposed upon the landowner. The difficulty of deciding what is a reasonable standard is no cause for denying the existence of a duty of care.

Apart altogether from these pragmatic considerations, the

decision seems to be based primarily on what Dr. Glanville Williams (*Liability for Animals*, Cambridge University Press, 1939) has called 'the qualified grant' argument. Viscount Maugham devoted most of his speech to a deep and interesting research into the origins of the highways of England. The conclusion was that adjoining landowners must be presumed to have dedicated the land, upon which the roads now run, subject to the implied condition that their animals should retain the 'freedom to roam'. It is worth noting that this theory, which has made such a large hole in the texture of the law of Tort, was adumbrated by one Chancery judge, Neville, J., in *Heath's Garage, Ltd.* v. *Hodges*, at p. 382, adopted by a second, Romer, L.J., in *Dean* v. *Davies*, [1935] 2 K.B. at p. 296, and has now been immortalised by a third.

So much for negligence and the duty of care. For actions based on nuisance, the same result can be achieved. 'If the premises are in the same condition as they were in when the highway was dedicated to the public, there is no nuisance because the dedication must be taken subject to the existing state of things.' (*Clerk and Lindsell on Torts*, 9th ed., p. 462, and see *Fisher* v. *Prowse* (1862), 2 B. & S. 770.)

For six objections to this qualified dedication theory the reader is referred to Dr. Glanville Williams (op. cit., p. 388). Here there is only space to suggest some of the consequences of such a ratio decidendi. Will it be open to the injured traveller in the future to rebut the presumption of qualified dedication, *e.g.*, by proving that the particular highway upon which he was injured ran originally over waste land? Such burdening of a simple running-down case outrages common sense. Again, is there to be no limit to the 'freedom to roam'? Kennedy, L.J., in *Ellis* v. *Banyard*, had suggested that an action would lie if animals were allowed to stray in large numbers. This dictum was followed in the Irish case of *Cunningham* v. *Whelan* (1917), 52 I.L.T. 67. But if the 'qualified grant' theory be correct, if there be no duty to take care, it is difficult to see how the number of animals or their size or (short of scienter) their dangerous qualities can make the slightest difference. Nor in logic need the freedom be restricted to animals. Suppose some farm vehicle were left negligently secured upon a hill overlooking a road. If it ran down on to the road, thus causing a bad accident, should liability be determined according to the date when the highway was dedicated? On this theory, one can visualise a case in which a farmer might be liable for a tractor or an elevator,

but not for a hay wain or a plough. Indeed, the only limitations that can be safely placed upon this ' freedom to roam ' is that no such licence is afforded to adjoining occupiers in *towns*, and that even in the country there may be criminal liability under the Highways Act, 1864. *Searle* v. *Wallbank* has made more urgent the hope of Goddard, L.J., in *Hughes* v. *Williams* that ' when the Law Revision Committee meets again after the war it may be possible to bring before it the law with regard to animals '.

C. FLETCHER-COOKE.

TOWN PLANNING AND JUDICIAL REVIEW

SECTION 1 (1) of the Town & Country Planning Act, 1944, provides that where the Minister ' is satisfied that it is requisite ', for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that parts of the area, consisting of land ' shown to his satisfaction ' to have suffered war damage and of any land adjacent thereto, should be laid out afresh and re-developed as a whole, he may make an order declaring all or any of such land to be subject to compulsory purchase, if a proper application is made to him by the local authority. After such an application has been made, objections may be lodged against the proposed order. Schedule I to the Act provides that the Minister must ' consider ' such objections before confirming the order. If he is ' satisfied ' that the statements of objection give him sufficient information, he may confirm the order forthwith. He may, on the other hand, cause a private inquiry or a public local inquiry to be held.

In *Phœnix Assurance Co.* v. *Minister of Town and Country Planning* [1947] 1 All E.R. 454, the Minister had confirmed a declaratory order made under section 1 (1) in respect of a war-damaged area in Plymouth, after holding a public local inquiry. The Phœnix Co. owned property in the area so designated; the re-development plan did not propose any alteration in the existing use or lay-out of their property. They applied to have the order quashed in so far as it related to their property. Two contentions were raised: (1) that the Minister must satisfy himself with respect to every piece of land in the area that it requires to be laid out afresh; (2) that his satisfaction must be based on reasonable grounds.

Henn Collins, J., found for the applicants. 'The statute', he said (at p. 457), 'is one which impinges on the rights of owners of property, it may be very heavily. . . . It is, therefore, to be read rather in favour of the individual than against him'. *Liversidge* v. *Anderson* had shown that a Minister might enjoy an absolute executive discretion; but that was a case of a measure designed to prevent a public danger in time of emergency. Here the Minister's functions were quasi-judicial; if they had been purely executive, the Act would not have provided a code of procedure for hearing objections. The words 'where the Minister is satisfied that it is requisite' meant 'satisfied on reasonable grounds of the facts to which the section refers. The existence of war damage is not a matter of opinion, nor is the question whether land is to be laid out afresh' (*loc. cit.*). The plan submitted by the local authority was definitive not only of the general scope but also of the details of the proposed lay-out, and it had not provided for any alterations to the applicants' property. Nor, in this case, had the Minister himself asserted that he was satisfied that the property required to be laid out afresh. The Minister had, therefore, failed to comply with the Act.

It is respectfully submitted that the judgment is open to criticism. The venerable common-law principle of statutory interpretation so emphatically affirmed by the learned judge may not prove the surest guide to the construction of 'an Act to make provision for the acquisition and development of land for planning purposes'. The wording of section 1 (1) does not suggest that it was necessarily intended to confine the operation of declaratory orders to properties actually designated for laying out afresh. If the Minister is satisfied that it is requisite to lay out a war-damaged area, together with adjacent land, afresh and re-develop it as a whole, he is empowered to make an order declaring all or any of the land in question to be subject to compulsory purchase. These words can doubtless be read in more than one sense (and the Act as a whole is a particularly difficult one to construe), but the interpretation given to them in the present case may lead to some strange results. For example, it might well prove necessary for the council to vary the original plan after the confirmation of the order, and to alter in some particulars the lay-out of further properties within the general area covered by the scheme. Henn Collins, J.'s, decision means that in such cases the elaborate procedure laid down in the Act would have to be followed in making fresh orders to reduce each of these island fortresses

of individualism. It might be sought to circumvent this difficulty by acquiring such properties under section 2 (2); but although that subsection gives the Minister very wide powers, it was designed to serve a different purpose.

Since the learned judge found on the facts that the Minister had not even satisfied himself that it was requisite to alter the applicants' property, it was not strictly necessary for him to have stressed that the Minister must be 'satisfied on reasonable grounds of the facts to which the section refers'. In any event, it does not follow that, because the Minister acts quasi-judicially when considering objections, his final decision can be challenged in the courts merely on the grounds that it is unreasonable. In the parliamentary debate on the committee stage of the Bill, the Government spokesman insisted that the grounds for the Minister's satisfaction under section 1 (1) were not open to judicial review: see 403 H.C.Deb. 823–4, 828–9. It is not quite certain that Henn Collins, J., did intend to convey that he thought they should be; but his language lends itself readily to that construction, and, with respect, it is difficult to see what else he could have meant.

Certainly in construing the provisions of the Housing Acts the courts have, in general, taken a more modest view of their functions. Section 1 of the Housing Act, 1930 (re-enacted in section 25 of the Housing Act, 1936), provides that where a local authority is satisfied that houses in its area are (*inter alia*) unfit for human habitation they may pass a resolution declaring the area to be a clearance area and submit a clearance order to the Minister. If objections are lodged he is obliged to cause a public inquiry to be held. He must 'consider' the report on the inquiry and 'may' then confirm the order. In several cases it has been held that the courts will not inquire whether the local authority's opinion concerning the condition of the houses was in fact based on reasonable grounds: see *e.g.*, *Re Bowman*, [1932] 2 K.B. 621; *Re Falmouth Clearance Order*, [1937] 3 All E.R. 308; *Re L.C.C. Order*, 1938, [1945] 2 All E.R. 484. In *Re Bowman*, Swift, J., said (at p. 634) that a local authority's order could only be challanged if there was 'no material . . . upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made'. It was not enough that they had acted on insufficient evidence; they must have acted on no evidence at all. And it is doubtful whether the courts will investigate in any way the Minister's grounds for confirming the order, provided he has properly considered the report on the inquiry. As far as the courts are

concerned, therefore, the condition of dwelling-houses under these Acts is undoubtedly a ' matter of opinion ', on which the local authority's opinion is decisive save in the most exceptional circumstances.

The Town and Country Planning Act gives the Minister discretionary powers at least as wide as those which the Minister of Health enjoys under the Housing Acts. It is indeed questionable whether the Minister's functions under the 1944 Act can properly be regarded as judicial at all. If they are in fact judicial . . . it is suggested that section 1 (1) ought to be construed as requiring the Minister to reach his decision in good faith, without a closed mind, and on the basis of *some* evidence, which need not inevitably be evidence sufficient to convince a High Court judge of its preponderant merit. The general principle involved is an important one; for it is a condition precedent to the exercise by the Minister of many of his powers under the Act that he should be satisfied that certain facts exist or that certain action is requisite or expedient.

This decision has been overruled by the C.A. (*Robinson* v. *The Minister* [1947] 1 All E.R. 851). At the time of writing no report of the proceedings in the Court of Appeal was available. Clause 5 of the Town and Country Planning Bill, 1947, as amended in Committee, expressly authorises the acquisition of land falling within a similar category to the Phœnix Co.'s property.

S. A. de Smith.

NOTE

The review of recent current literature is unavoidably held over until the next number.

It is regretted that the name of the author, R. Colinvaux, was omitted from the Note on *Nugent-Head* v. *Jacob*, at page 198 of the previous number.

REVIEWS

FULL POWERS AND RATIFICATION: A STUDY IN THE DEVELOPMENT OF TREATY-MAKING PROCEDURE. By J. MERVYN JONES, M.A., LL.B. (Cambridge University Press. 1946. xv and 182 pp. 12s. 6d.)

MR. JONES traces the historical development of Full Powers and Ratification, and the fundamental thesis of his little book appears from the following extract: 'In the seventeenth century Full Powers gave authority to make a binding agreement subject to a confirmation which was obligatory. Today authority is given by Full Powers to discuss, to negotiate, and to sign a *projet* which may or may not become an international treaty by the formal acceptance of it by States. Ratification is now regarded as being this formal acceptance. It means the ratification of the treaty itself. Formerly, it meant the ratification of an agent in signing it (and) could not be refused unless the envoy had exceeded his authority. . . . The general view today is that such ratification is discretionary. . . . The purpose of ratification is to indicate the final willingness of the State to be bound by the Treaty'. Few will argue with this description of the respective functions of Full Powers and Ratification, but many may justifiably inquire whether it was necessary to devote a whole monograph to the proof of this thesis, for it had already been amply dealt with by, among others, Dana's Wheaton (s. 269), Lorimer (*Institutes*, 1883, Vol. I, p. 263), Twiss (*Law of Nations*, 1884, Vol. I, pp. 362–3), Walker (*Manual*, 1899, pp. 84–5), F. E. Smith (*International Law*, 1900, p. 86), Taylor (*International Public Law*, 1901, p. 387), and Fauchille (*Droit International Public*, 1926, s. 824); while Craddock deals with the matter in the following way: 'By the early writers on international law, living at a time when the theory of personal sovereignty generally obtained, and the negotiator was the immediate agent of the sovereign, the rule of the Roman law, that the principal is bound by the agent acting within his powers, was applied to treaty negotiations. The advantage of entrusting full and general powers to negotiators, and the importance of the trust, have led recent writers quite generally to admit the right of ratification, even if no express reservation be made in the treaty or full powers. A reservation of this right is now, by the practice of nations, to be read into the full powers of the negotiator' (*Treaties, Their Making and Enforcement*, 1916, s. 3). The only innovation made by the author of *Full Powers and Ratification* is to recite examples

from State practice since the seventeenth century. It is submitted that it was hardly necessary to resort to such extremes to prove what has long been an accepted fact, particularly as the matter has been adequately dealt with in the past and cannot be considered as one of the major problems of modern international law.

When discussing the legal nature of ' agreements between a protected State and its protector ', Mr. Jones asserts that ' it cannot be doubted that they are regarded as legally binding between the parties. It does not appear objectionable, therefore, to describe them as international treaties ' (p. 44). In its Advisory Opinion on the *Nationality Decrees in Tunis and Morocco* the P.C.I.J. observed that ' in spite of common features possessed by protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development ' (B/4, p. 27), and it is submitted that in the light of this observation the decision whether such treaties are instruments under municipal law or under public international law depends entirely on the intention of the parties in each individual case.

The author points out the twofold character of ratification and maintains that ' parliamentary ratification ' is merely parliamentary confirmation required by municipal law, and not really ratification at all; for ' ratification is an international confirmation, a public act of the State embodied in a document which is communicated to other States in the manner prescribed by custom or by the terms of the treaty ' (p. 73). Sometimes a treaty recognises the necessity for parliamentary ratification, but even then it provides for some further act to grant such ' parliamentary ratification ' international recognition. An example of this is to be found in the United Nations Charter, Article 110, paragraphs 1 and 2. When discussing ratification in modern practice, Mr. Jones raises the problem of the effectiveness of a treaty that has been signed but not ratified, and suggests that ' some legal significance must be attached to signature even in modern law. . . . If any liability should arise it will not be based on the treaty régime but on the " general principles of law ". The treaty as such is ineffective unless completed by ratification '. In this connection he contends ' that the Permanent Court has not yet committed itself to an unqualified rejection of the principle of good faith '. It may well be argued, however, that the quotations he refers to in this matter do not support his contention, for, in discussing the jurisdiction of the *Oder Commission*, the court said that conventions are ' made effective in accordance with the ordinary rules of international law amongst which is

the rule that conventions, save in certain exceptional circumstances, are binding only in virtue of their ratification ' (A/23, p. 20) (pp. 81–3).

Mr. Jones maintains that constitutional limitations on the treaty-making power are internationally effective, for ' it is surely the business of States to ascertain each other's laws on these points. The fact that no instances are recorded of inquiries to this effect merely shows that, in most cases, information is so readily available, and the law so obvious, that no inquiries are necessary ' (p. 155). Unfortunately, it is not correct to say that the ' information is so readily available, and the law so obvious ', for in the United States it is not easy to differentiate between (i) treaties which require a vote by two-thirds of the Senate to become effective, (ii) executive agreements which can be made by the President alone, such as the arbitral agreement for the *Pius Funds* Case, although that for the *Palmas* Case required a two-thirds vote of the Senate, and (iii) those agreements which are only made effective by a Joint Resolution of Congress, such as that of 1865 terminating the 1817 arrangement concerning armaments on the Great Lakes. In the same year the Secretary of State withdrew the original American notice of termination, and we find in Moore's *Digest of International Law* that ' As between the United States and Great Britain this act of withdrawal " was no less authoritative than the notification itself ". Into the authority of the Secretary of State either to give or withdraw the notice, the British Government was " incompetent to inquire "; it " could only accept or reject the withdrawal as a fact ". The question of competency " being a matter of domestic administration, affecting the internal relations of the executive and legislative powers ", in no wise concerned Great Britain. The raising by her of a question as to " the authority of the executive power " in the matter would have constituted " an unprecedented and inadmissible step in the international relations of governments " ' (Vol. V, p. 170). This extract is in direct contradiction to Mr. Jones' assertion that ' it is surely the business of States to ascertain each other's laws on these points ', and if this is true of a statement by the Secretary of State, it is surely more true of the treaty-making power. Furthermore, the P.C.I.J. in the *Eastern Greenland* Case does not seem to support the international relevancy of constitutional limitations, for the judgment stated that a Government was bound by the statement of its Foreign Minister ' in regard to a question falling within his province ', and Judge Anzilotti, in his dissenting opinion, thought the constitutional law of the Minister's country to be irrelevant from the point of view of the country to whom the Minister had made the statement,

for it was the latter's 'duty to refrain from giving his reply until he had obtained any assent that might be requisite under (his country's) laws' (A/B 43, pp. 71, 92). It is suggested that, similarly, a State is entitled to regard another State as bound by an agreement it has entered, in purported exercise of its treaty-making power.

The appendix of this little book will be of interest to those who seek examples of British and foreign Full Powers and Ratifications from the eighteenth to the twentieth centuries gathered together in a readily accessible form.

L. C. Green

China Moulded by Confucius. By His Excellency Dr. F. T. Cheng. (London: Stevens & Sons, Ltd. 1947. 264 pp. (with index). 18s. net.)

It was a happy thought on the part of the editors of the Library of World Affairs, of which this volume is number two, to invite Dr. Cheng Tien Hsi, the distinguished Chinese lawyer judge and diplomat, to write a non-technical account of the philosophy of Confucious and of its influence upon the political, social and cultural growth of China. It is pleasant to think that a man of such urbanity and culture is now the Chinese Ambassador in London. His book affords pleasant and instructive reading, and I have no hesitation in recommending it to all who, such as myself, have an interest of a quite unspecialised character in that great country and her history.

After a general survey of the Chinese approach to problems of man as a civilised being and a discussion of the three great principles of *li*, *jiun tze*, and *chin*, which he explains do not quite mean propriety, gentlemanliness and sentiment (the usual translations), Dr. Cheng offers us a series of chapters on religion, philosophy, family, marriage, friendship, literature and art in the light of the Confucian philosophy. It is not for me to assess the value of these, but they are of much interest, and taken as a whole afford a clear and succinct account of Chinese culture. The direct teaching of the Confucian school on literature and art does not appear to be substantial,[1] but literature and art reflect the deep culture of a nation, and it is obvious that in China they have been enormously influenced by the Confucian teaching since this has dominated the whole outlook of the educated classes.

Looking through the chapter contents, I was a little surprised to find that there is nothing on law. It is, indeed, a matter of great interest and significance that alone among the outstanding civilisations the Chinese have created no great

[1] There was a Confucian canon of music, but this was lost many centuries ago.

system of law or juristic philosophy. The comprehensive section on Chinese literature in the *Encyclopædia Britannica* (11th ed.), for example, contains nothing on law. When a system of manners or, indeed, of moral conduct, such as those contained in the conceptions of *li*, *jiun tze*, and *chin*, has attained such a hold on a nation at an early stage in its history, as was the case in China, the need for a strong jurisprudence, such as the civil law or the common law, would be hardly felt, and this may be the reason for the comparative weakness in this facet of Chinese culture. Dr. Cheng does make some suggestion of this sort, but it would have been a valuable addition to his book if he had discussed the matter more fully. Meanwhile, with the decline in the old standards we may suspect that the absence of a strong and stable legal system is a substantial factor in the failure of the Chinese to put their house in order.

Chinese culture is marked by an urbanity and a sense of proportion which are eminently classical, and it is not surprising that it first began to have a marked influence on our own culture during the eighteenth century. Dr. Cheng is widely read in English literature, but it is obvious that our eighteenth century authors, such as Addison, Goldsmith, Samuel Johnson, have made the greatest appeal to him, and the numerous apposite quotations which he makes from their works are in full sympathy with the Chinese outlook.

The only criticism which I have to offer is that Dr. Cheng sees his subject through rose-tinted spectacles: everything is perfect, or very nearly so. Confucianism is, of course, a strongly conservative philosophy, and its resistance to western ideas has its bad as well as its good side. Some western criticism of things Chinese, especially that coming from Victorian missionaries, was simply silly, and Dr. Cheng has no difficulty in disposing of it. A great deal of the reactionary and thoroughly undemocratic policy which is associated with the right wing of the Kuomintang is founded on Confucianism. It is no doubt tactful, if not in accordance with *li*, of Dr. Cheng to avoid the discussion of such unpleasant matters, but China is being more strongly ' moulded ' during the present generation than at any time since that of Confucius himself, and the failure to face up to this fact is certainly a blemish on this otherwise excellent work.

Again, Dr. Cheng occasionally gives the impression of wishing to persuade us that his countrymen are of a righteousness and virtue almost angelic. He insists, for instance, more than once, that Chinese literature contains nothing which is improper. I thought at first that he must be excluding the novel from literature, as is often done by the Chinese. Later, however, he gives a long and interesting excerpt, in translation,

of a well-known Chinese novel. But if we are to include fiction, it is well known that much of the Chinese variety is as pornographic as any to be found, and this applies to such masterpieces as the *Ching-Ping-Mei*. 'Within the four seas all men are brothers' and the Chinese have, I am sure, a good share of the frailties with which we are familiar in the West.

C.

THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION. By JOHN LOCKE. Edited with an introduction by J. W. GOUGH. (Blackwell, Oxford. 1946. xi and 165 pp. 8s. 6d.)

THIS is an excellent edition of all that is permanently valuable in Locke's political thought. The first of the two *Treatises of Civil Government* is a reply to Filmer's *Patriarcha* and is now of historical interest only. The second treatise here edited is still of vital importance and great relevance. In the same way the *Letter concerning Toleration* included in this edition is the first of three such letters but the second and third add little to the fundamental argument, which is made plain in the first *Letter*.

As to the texts, Mr. Gough has based his edition of the *Treatise* on the sixth (1764) edition. The queer relationship between author and publisher in the late seventeenth century is illustrated by the fact that a modern editor has to go for his text to the sixth edition, published sixty years after the death of the author. In his will Locke gives a list of his published works and after mentioning the *Two Treatises* he adds in a bracket 'whereof Mr. Churchill has publish'd several Editions, but all very incorrect'. In fact Churchill had published three editions and it is difficult to understand why Locke could not have corrected at least the second or third edition. Presumably he was not given the opportunity. Additions were made in 1714 but it was not until 1764 that full cognisance appears to have been taken of Locke's own wishes. At any rate 'corrections and improvements' of Locke's were incorporated in this text, although whether Locke himself would have incorporated them we have no certain knowledge. Again in the case of the *Letter Concerning Toleration*, the text before us is not Locke's but the translator's, William Popple. He translated Locke's Latin text which had appeared in Holland the same year and published it, apparently without Locke's knowledge. Whether Locke ever vetted the translation we do not know, and I have never heard of anyone comparing the original with the translation to see whether it is a good one. The preface, which contains the celebrated phrase: 'Absolute liberty, just and true liberty,

equal and impartial liberty, is the thing we stand in need of ', has been assumed by many to have been written by Locke, but it is much more likely to have been Popple's work. These points illustrate the difficulty of determining finally and in detail what Locke himself wrote, but there is no doubt of course about the main substance of his argument.

The editor's introduction is a very useful one and ought to prove helpful to the student. After a brief account of Locke's life, Mr. Gough passes at once to the *Treatise*. He examines Locke's account of the state of nature, the social contract, tacit consent, property, the supremacy of the law-making authority, the separation of powers, the notion of government as trusteeship and finally the right of revolution. He then adds a briefer section in which the argument of the *Letter Concerning Toleration* is outlined.

On many of these points it is clear that Mr. Gough would have liked to have said more, if more space were available. One would welcome from his hands a full study of Locke's political philosophy. I found his remarks about the law of nature, government as trusteeship, the absolute supremacy of the people, for instance, very illuminating and should like to see him expand them. A question which interests me is why Locke failed to make the judiciary his third power in discussing the separation of powers. Is there any historical reason for this? It would also be interesting to see how Mr. Gough would develop his point about the futility of making individual consent the basis of political thought. Would he rule out individual consent as entirely irrelevant in political life? If it is relevant at all, what is its place? There are many other questions on which, one feels, Mr. Gough could throw light in a fuller study. In the meantime the reader will be thankful for this introduction.

The edition lacks an index, which is a pity.

R. I. Aaron.

Essai de Sociologie. By J. Haesaert, Professor of the University of Ghent. (250 francs (Belgian)).

This is a comprehensive treatise on sociology which bears all the evidence of prolonged research and mature reflection. It is written with great clarity and balance and shows refreshing independence from the clamorous fashions of the day. It makes a great deal of use of anthropological material, but by no means to the exclusion of the vast storehouse of the history of the civilisations. The author adopts for his discussion a division of sociology into statics, dynamics and mechanics. By statics he understands the relations of members of the community considered as in a state of equilibrium. Here he gives an account of the main types of communities and the

psychology of the bond which keeps them together. His handling of psychology is of great interest. He avoids all theories of a group-mind, independent of, or superior to, the individual minds composing the group. The phenomena usually adduced as evidence for a group-mind are treated as the results of like reactions of individual minds under similar conditions; as co-ordinated activities; and finally as the joint products of the play of mind on mind. While dismissing the crude generalisations about group characteristics which abound in popular social psychology he yet does not deny the reality of national characteristics and shows great discrimination in handling this problem. Under the heading of joint products he deals in an interesting manner with religion as a social phenomenon and he gives an analysis of social structure including the forms of the family and political and economic organisation. Though the treatment is brief it is illuminating and instructive throughout.

By dynamics the author understands a treatment of the forces behind social life. These consist ultimately of the energies of men and their efforts to accommodate themselves to, or overcome the resistance of the environment. This is perhaps the most interesting part of the book. The author challenges all those views which regard social change as automatic or coming about by an inner necessity independent of the human being. He shows that the so-called iron regularities stressed by Quetelet and others will not stand examination. The facts disclosed by statistical studies are best explained by assuming that individuals are capable of free action but limited by the range of possibilities open to them. Purpose is a real force but it has to operate against conditions which it cannot entirely control. Hence a degree of freedom within a sphere of necessity. The various domains of social life, such as religion, science and art, are surveyed from this point of view and their influence on one another is examined. Our author maintains that within limits each of these domains has its own life and follows an inner growth. He rejects, for example, the view that the development of science is conditioned in the main by social factors and the still more radical view that the categories of thought are themselves socially conditioned, maintained by some French sociologists. He rejects likewise the theory of economic determinism and the view of the Freudians that social life is rooted in sex. Avoiding these huge generalisations he is content to study the various forms of human activity directed to overcoming or controlling the difficulties which arise out of the biological equipment of man, the geographical environment, and the results of its own efforts which often create fresh difficulties of their own.

Finally, under social mechanics the author deals with the

means by which the members of a community are enabled to work together. Here he considers the means of communication and transport, the effects of mobility, spatial and social, and the various agencies of social control such as usages, good manners, moral rules and juridical rules. Here again the treatment is brief but everywhere shrewd and penetrating.

In a work of such wide range specialists will no doubt find a good deal which may be disputed or questioned, but the general impression made by the book is that it is the work of a mind singularly cool and free from illusion but inspired by a belief in the power and persistence of the human mind.

M. Ginsberg.

A Manual of the Law of Real Property. By R. E. Megarry, M.A., LL.B., Barrister-at-Law. (London: Stevens & Sons and Sweet & Maxwell. xxxii, 565 and 25 pp. 25s. net.)

Since the Property Legislation of 1925 there have been many students' books on Land Law but none has been completely satisfactory. Students and teachers will welcome this book as meeting their needs to a far greater extent than any of its forerunners. In my opinion it is the best book on Real Property since *Challis*.

Of all legal subjects, Real Property is that which most repels the beginner and any introductory manual must therefore concentrate on making the subject as clear and as interesting as possible. Mr. Megarry is peculiarly qualified for the task of writing such a book, as his admirable work on another difficult and highly technical subject—the Rent Acts—has already shown, and once again his gifts of clear, lucid and interesting expression are displayed to advantage. The book is arranged so as to reduce repetition to a minimum and the task of the beginner is made easier by a full glossary of terms. Another excellent feature is that the pronunciation of many expressions is given which is likely to relieve the student of an embarrassment felt by many students of an older generation.

But Mr. Megarry would be the first to admit that even he cannot make the subject a simple one; indeed, from a teaching point of view it has been made more difficult by the Property Legislation which, by concentrating on the removal of practical conveyancing difficulties without altering general principles, has made it harder to find those general principles and to explain them to the student. The draftsman of the Acts declared that it was not his intention to pour new wine into old bottles. Unfortunately he did precisely that. How else is one to describe the continued forcing of the 'curtain provisions'

and the registration of land charges into the strait jacket of legal and equitable interests? Although lip service is paid to the rule that legal interests bind everyone and that equitable interests do not bind the bona fide purchaser for value without notice, the fact is that this distinction plays little part in modern land law. The general distinction today is between over-reachable interests and interests which cannot be over-reached, the latter class being in turn divided into those which require registration and those which do not. These classes of course overlap to some extent, but notice in the true sense is generally irrelevant in all cases.

I feel that this is a point which cannot be emphasised too strongly and that Mr. Megarry does not perhaps emphasise it sufficiently.

I also think that he sometimes tends to include too much detail. In his Preface he states that ' the book is primarily intended for the examination candidate whose main anxiety is not whether he will head the list but whether he will appear in it at all '. Mr. Megarry is too modest; any candidate who had mastered the contents of this book would head the list in any examination. The student whose pre-occupation is to obtain a bare pass would, I think, find the book even more helpful if it were shorter and less exhaustive—for it is exhaustive despite its brevity when compared with *Cheshire*. The learned author indicates that it is a simplified version of a larger textbook which is virtually the same save that it is lavish in the quotation of authorities and contains a number of additional passages scarcely suitable for beginners. The Manual is indeed commendably sparing of quotations, but I feel that the author has been insufficiently ruthless in pruning passages ' scarcely suitable for beginners ' and that had he set out initially to write a book for them he would have produced something shorter and simpler. He rightly points out that part of the difficulty in deciding what to include and what to leave out depends on where one draws the line between real property and conveyancing and that, as these are essentially branches of the same subject, the division is one of taste and convenience rather than logic. Another part of the difficulty is that the scope of a students' book is dependent on the examinations' curricula; and here one comes upon something approaching a vicious circle, books tend to depend on the examinations and examinations on the books. It may therefore seem churlish to suggest that Mr. Megarry has been too generous in his inclusion of conveyancing matters, but I believe that in a students' book the golden rule is, ' when in doubt, leave out ', and I think that the opposite principle has sometimes been followed in this book, particularly in the chapter on Wills and Intestacy.

Turning to minor points of detail: The discussions of class gifts (pp. 303–4) and of the Prescription Act (pp. 443 *et seq.*) seem to me to furnish clear examples of undue detail in a manual of Real Property. Chapter 12 on Covenants Affecting Land is admirable but I have two small criticisms: (a) that p. 388 suggests that restrictions have to be covenants in the strict sense (which is not so in equity) and (b) that at pp. 397 *et seq.* the possibility of an express assignment of the benefit is insufficiently dealt with. In the second edition, which will undoubtedly be soon needed, the treatment of Licences (pp. 427 *et seq.*) will require revision in the light of *Millenium Productions* v. *Winter Garden Theatre*, [1946] 1 All E. R. 678. Finally, in the chapter on Mortgages I regret the absence of any mention of floating charges which raise questions of some juristic interest and difficulty which seem to me more appropriate to a book on Real Property than some of the conveyancing questions which are dealt with. There seems to be a general agreement among textbook writers on Real Property to ignore these questions as being matters of Company and not Land Law, but this to my mind has had regrettable consequences and has caused many students to finish their legal education in complete ignorance of one of the most common and important types of mortgage.

But these points are minor matters of personal opinion. What is beyond doubt is that this is a first-rate book which will meet a long-felt want. The publishers also deserve congratulation upon an excellent piece of book production at a price which by modern standards is exceptionally reasonable.

L. C. B. G.

AN INTRODUCTION TO ROMAN-DUTCH LAW. Fourth edition. By R. W. LEE, D.C.L., F.B.A., Rhodes Professor of Roman-Dutch Law, Fellow of All Souls College, Oxford, HON.LL.D. the University of Witwatersrand, Docteur (honoris causa) de l'Université de Lyon, Vice-Président de l'Académie Internationale de Droit Comparé, a Master of the Bench of Gray's Inn. (Oxford: At the Clarendon Press. 1946. lxxvi and 475 pp. 25s. net.)

THIS book requires no introduction; not only is it the standard work for the student, but it is also widely used by the practitioner in Ceylon and South Africa. (Those members of the Johannesburg Bar with whom the reviewer talked during a recent visit to South Africa unanimously commended it as necessary and indeed indispensable in practice.)

The last edition appeared fifteen years ago—an interval all too long for a work as important as this. It is hoped that future editions will be published more frequently.

The whole book has been carefully revised, and certain additional topics have been introduced. For instance, there are two new appendices; the one providing a 'finger-post' for those seeking direction on the conflict of laws, the other on inheritance *ab intestato* in Ceylon. Again, in the chapter on testamentary succession, there has now been included a section on trusts (p. 388 *et seq.*). (In Ceylon the *fideicommissum* and the trust exist side by side, but in South Africa the trust 'is interpreted (or disguised) as a *fideicommissum* or *stipulatio alteri*' (which is most unsatisfactory). In view of the prevalence today in South Africa of dispositions (particularly testamentary dispositions) couched in the form of a trust, the reviewer strongly endorses Professor Lee's statement that 'a regret may be permitted that the law of South Africa has not frankly accepted the trust conception, or at least its terminology, as a useful importation from a foreign system' (p. 391). (It may here usefully be added that the rules concerning *donatio* serve further to complicate this question.))

The chapter on *delict* has been extended. The action for affront (for which, be it noted, there is no requirement of 'publication') and the defences to an action for defamation are now set out in detail. Nevertheless, it is felt that this chapter is still too compressed. (Is not a page of cases on the law of defamation—p. 344—somewhat out of proportion in a chapter of but twenty-five pages?)

In the section on *donatio* no reference is made to section 3 (2) (a) of the Prescription Act, 1943, which provides that the right to recover 'the excess in value over £500 of any donation which has not been registered or notarially executed' shall prescribe in ninety days from the date of delivery. Such omission is all the more surprising when it is seen that the other provisions of this Act have been incorporated where relevant.

The appendices have not been overlooked by the author, and parts thereof have been rewritten. But why, in Appendix G ('Stipulations for the benefit of a third person'), is there yet no mention of the articles on this controversial subject by Professor McKerron (46 S.A.L.J. (1929), p. 387) and Mr. Behrmann (53 S.A.L.J. (1936), p. 279)?

In previous editions the text tended to be too concise—a rapid glance will show that in a great number of cases the footnotes occupied more than half the page. A more satisfactory balance has been achieved in the present edition by the elevation of many of these into the text. (Notice, for example, how the exposition of the doctrine of *collatio bonorum* (p. 355; 3rd ed., p. 348) and of the action for loss caused by death (pp. 329–330; 3rd ed., p. 328) has gained in clarity as a result.) Students in particular will welcome a continuation of this policy in succeeding editions.

This work occupies a unique position in present-day legal literature, and hence no further recommendation is called for here. It is sufficient merely to state that this edition attains in every way the high standard of the three preceding it.

J. D. HAYMAN.

MOTOR CLAIMS CASES. By LEONARD BINGHAM. (London: Butterworth & Co. (Publishers), Ltd. 1946. xxiii and 311 pp. 30s. net.)

IT does not frequently happen that a busy city solicitor finds time to produce a book. Mr. Bingham has now achieved the almost impossible, and all those who have to deal in one way or another with the day-to-day working of the law will have many occasions to acknowledge their debt to him.

It is necessary to stress at the outset what the book does not and what it does profess to be. It does not profess to be an exhaustive treatise on the law of negligence or of motor insurance; still less does it profess to be a piece of academic research into the principles or foundations of those branches of the law. Mr. Bingham has not set himself to contribute something new to legal thought; he has been content to limit himself to producing a work-a-day tool for the work-a-day person who, whether in an insurance office or in a solicitor's office or in Chambers in the Temple, has to concern himself with the law in its practical aspects. The book accordingly takes the form of a digest of the legal material with which those who deal with motor claims are obliged to have, if not at their fingertips, at any rate handy for reference at a moment's notice. The relevant provisions of statutes and delegated legislation necessarily have their place, but the major part of the book consists of the case law—not in the form of bare headings, but in the form of a clear and concise note of the essence of a decision, with extracts where appropriate from the more important judgments.

In a work of this kind much, of course, depends on the arrangement adopted. It is a curious trait of human nature that most people have their own ideas as to the best method of arranging a large body of material—and most people's ideas are entirely different from everyone else's. This reviewer personally finds the whole topic tedious, being content with any arrangement which is clear and handy and followed consistently. Judged by these tests, there is nothing in the book to quarrel with. Having divided his subject into broad headings, Mr. Bingham deals with the topics in each heading on straightforward alphabetical lines—and this is just what a practitioner wants. A textbook writer would no doubt kick himself or get kicked if he succeeded in getting 'Last

Opportunity ' and ' Latent Defect ' next door to each other; a practitioner who wants the latest or clearest authority on ' Latent Defect ' does not care where he finds it as long as he *can* find it, and is spared the annoyance of burrowing in indexes which chase him round and round from one cross reference to another.

The general chapter headings are ' Negligence ', ' Damages ', ' Evidence ', ' Practice ', ' The Road Traffic Acts ' and ' Insurance Points '. Under each of these headings an impressive body of material is gathered together, sifted and explained. Old cases of general importance are included, but Mr. Bingham has wisely concentrated on recent authorities wherever possible. Nor has he eliminated controversies which are now settled, a decision welcome to anyone who is interested in the ebb and flow of the law as a social force. The reader can thus follow in a few pages the tortuous writhings in which the Courts indulged on the subject of unlighted shelters in highways until the Court of Appeal finally settled the issue in *Fisher* v. *Ruislip*, [1945] K.B. 584. The House of Lords—the main cause of all the trouble with their decision in *Great Central Ry.* v. *Hewlett*, [1916] 2 A.C. 511—have yet to say what it was that this case really did decide. Another sad chapter in recent legal history is illustrated by the cases on loss of expectation of life; a graphic table shows the widely variant figures awarded in different cases prior to *Benham* v. *Gambling*, [1941] A.C. 157; even since that case there have been fluctuations between £100 and £500, but this is better than a range running from £0 (a jury's estimate, reversed in the Court of Appeal) to £2,000 awarded by a High Court Judge, who was also reversed in the Court of Appeal.

Space forbids a detailed examination of the book or discussion of the many fascinating topics with which it deals. Nor would any useful purpose be served by setting out in detail suggestions for corrections and improvements in a later edition; an author always welcomes these, but they can be (and have been, so far as this reviewer is concerned) transmitted privately. Suffice it, therefore, to say in conclusion that one reader at any rate has found this book a most valuable and entertaining refresher course after years in the wilderness of Whitehall. As a handy work of reference, an indispensable *vade mecum*, for practical lawyers from judges downwards, it fills a real need and all of them will feel grateful to Mr. Bingham for making public property what has hitherto been his own personal bible.

Stephen Chapman.

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Books for review should be sent to the care of the Publishers.